No. 97-1337

In The
Supreme Court of the United States
October Term, 1997

STATE OF MINNESOTA, Minnesota Department of Natural Resources; RODNEY SANDO, Commissioner of Natural Resources; ARNE CARLSON, Governor of Minnesota; RAYMOND B. HITCHCOCK, Assistant Commissioner of Operations, Minnesota Department of Natural Resources,

Petitioners,

v.

MILLE LACS BAND OF CHIPPEWA INDIANS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX
VOLUME IV, Pages 886 to 1194

MARC D. SLONIM
Counsel of Record

JOHN B. ARUM
ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 Fourth Avenue, Suite 1230
Seattle, Washington 98121-2331
(206) 448-1230

Counsel for Respondents Mille Lacs Band of Chippewa Indians

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

JOHN L. KIRWIN
Assistant Attorney General
Counsel of Record

PETER L. TESTER
MICHELLE E. BEEMAN
Assistant Attorneys General
445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127
(651) 296-3044

Counsel for Petitioners

(Additional Attorneys Continued)

Petition For Certiorari Filed February 17, 1998
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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

CHARLES J. COOPER
ALAN K. PALMER
COOPER, CARVIN & ROSENTHAL
2000 K Street, N.W.
Suite 401
Washington, D.C. 20006
(202) 822-8960

JAMES M. GENIA
SOLICITOR GENERAL
MILLE LACS BAND OF
CHIPPEWA INDIANS
HCR 67, Box 194
Onamia, MN 56359
(320) 532-4181

DOUGLAS B.L. ENDRESON
ANNE D. NOTO
SONOSKY, CHAMBERS,
SACHSE & ENDRESON
1250 Eye Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 682-0240

HENRY M. BUFFALO, JR.
JACOBSON, BUFFALO,
SCHOESSLER & MAGNUSON, LTD.
810 Lumber Exchange
Ten South Fifth Street
Minneapolis, MN 55402
(612) 339-2071

DENNIS J. PETERSON
FOND DU LAC RESERVATION
LEGAL DEPARTMENT
1720 Big Lake Road
Cloquet, MN 55720
(218) 878-2607

HOWARD J. BICHLER
OFFICE OF TRIBAL ATTORNEY
Highway 70 and
Angeline Road
P.O. Box 287
Hertel, WI 54845
(715) 349-2195

CAROL BROWN BIERMEIER
BROWN & LACOUNTE
2916 Market Place Drive
Madison, WI 53719
(608) 288-8360

JAMES M. JANNETTA
523 Ashmun Street
P.O. Box 1292
Sault Ste. Marie, MI 49783
(906) 635-6050 ext. 26302

GUY CHARLTON
CHARLTON LAW OFFICE
840 North Old World
3rd Street
Suite 500
Milwaukee, WI 53203
(414) 272-2855

MILTON ROSENBERG
40 Glenway Street
Madison, WI 53705
(608) 231-6784

M. JOAN WARREN
M. JOAN WARREN
& ASSOCIATES
310 Fourth Avenue S.
Suite 500
Minneapolis, MN 55415
(612) 335-8787

ELIZABETH ANN PETERSON
Department of Justice,
Appellate Section
Environment & Natural
Resources Division
P.O. Box 23795,
L'Enfant Station
Washington, D.C. 20026
(202) 514-3888

SOLICITOR GENERAL OF THE
UNITED STATES
Room 5614
Department of Justice
10th Ave. NW
Washington, D.C. 20530
(202) 514-2201

GARY E. PERSIAN
RANDY V. THOMPSON
PERSIAN, MACGREGOR
& THOMPSON
1530 International Centre
900 Second Avenue
South
Minneapolis, MN 55402
(612) 339-6733

JAMES MARTIN JOHNSON
Capitol Court
1110 South Capitol Way,
Suite 225
Olympia, WA 98501
(360) 357-3104

TABLE OF CONTENTS

Page

Volume I

Relevant Docket Entries 1

I. *Mille Lacs Band v. State – 1993-94 Summary Judgment and 1994 Trial Exhibits*

I.1 Northwest Ordinance, 1 Stat. 51-53 (July 13, 1787) 8

I.2 Removal Act, 4 Stat. 411-12 (May 28, 1830) 20

I.3 Message from the President of the United States, upon the subject of the contemplated removal of Indians to the west of the river Mississippi, February 15, 1832. House Document No. 116, 23rd Congress, 1st Session, Serial 219. 24

I.4 Act of March 3, 1837, 5 Stat. 158, *selected pages 27

I.5 Butler to Poinsett, April 20, 1837. 3 Opinion of Attorney General, P. 206. 40

I.6 Harris to Dodge and Smith (May 13, 1837) 42

I.7 1837 Treaty Proceedings (Journal of Treaty Negotiations). 45

I.8 Dodge to Harris (August 7, 1837) 94

I.9 Boutwell to Greene (August 17, 1837) 98

I.10 Dodge to Harris (May 18, 1838) 102

I.11 Dodge to Harris (October 1, 1838). 105

I.12 Bushnell to Dodge (February 13, 1839). 108

I.13 Dodge to Crawford (October 18, 1839). 110

I.14 Crawford to Stuart (August 1, 1842). 113

I.15 Brunson to Doty (January 6, 1843) (excerpts) 119

TABLE OF CONTENTS – Continued

		Page
I.16	S. Doc. No. 403, 29th Cong., 1st Sess. (1846)	124
I.17	Memoranda, In relation to lands east of the Mississippi river, in Wisconsin, yet owned by Indians, and accompanying map (1847)	131
I.18	1848 COIA Report, *selected pages	134
I.19	Medill to Ramsey (June 27, 1849)	140
I.20	1849 COIA Report, *selected pages	142
I.21	Rice to Ramsey (December 1, 1849)	148
I.22	Rice to Ramsey (February 15, 1850)	152
I.23	Hall to Treat (February 25, 1850)	154
I.24	Ramsey to Livermore (March 4, 1850)	161
I.25	Minnesota Chronicle and Register (March 9, 1850) (excerpts)	164
I.26	Livermore to Ramsey (March 26, 1850)	166
I.27	Livermore to Brown (April 10, 1850)	174
I.28	Beaulieu to Borup (April 25, 1850)	176
I.29	Sen. Ex. Doc. No. 1, 31st Cong., 2d Sess. (December 2, 1850) (Report of the Commissioner of Indian Affairs) (excerpts)	179
I.30	Mendenhall to Lea (January 6, 1851)	189
I.31	Treat to Lea (January 21, 1851)	198
I.32	Warren to Ramsey (January 21, 1851)	203
I.33	Ramsey to Watrous (February 10, 1851)	212
I.34	Lea to Stuart (June 3, 1851)	214

TABLE OF CONTENTS – Continued

		Page
I.35	Chippewa Address at Swan River (June 30, 1851)	216
I.36	Mix to Graham (August 23, 1851)	223
I.37	Letter and Telegraph of August 25, 1851, Sec. of Int. to Comm'r of Indian Affairs: Telegraph from Comm'r to Agent Watrous	225
I.38	Buffalo to Lea (November 6, 1851)	226
I.39	Ramsey to Lea (December 26, 1851)	234
I.40	Wheeler to Father (October 27, 1853)	237
I.41	Gilbert to Manypenny (December 14, 1853)	238
I.42	Wisconsin Memorial to the President and Congress of the United States (February 27, 1854)	246
I.43	Cong. Globe, 33rd Cong., 1st Sess. 1032-33 (May 1, 1854)	248
I.44	Gilbert to Manypenny (May 27, 1854)	261
I.45	Manypenny to Gilbert (August 11, 1854)	263
I.46	Manypenny to Gilbert (August 12, 1854)	268
I.47	Gilbert to Manypenny (October 17, 1854)	270
I.48	Sen. Ex. Doc. No. 1, 33rd Cong., 2d Sess. (December 4, 1854) (Report of the Commissioner of Indian Affairs) (excerpts)	275
I.49	Sen. Exec. No. 5, 33rd Cong., 2d Sess. (January 4, 1855)	282
I.50	Rice to Manypenny (December 17, 1854)	286
I.51	Manypenny to Gorman (January 4, 1855)	288

TABLE OF CONTENTS – Continued

		Page
I.52	Sen. Exec. No. 20, 33rd Cong., 2d Sess. (March 3, 1855)	290
I.53	Gorman to Manypenny (February 16, 1855)	295
	Volume II	
I.54	Treaty Negotiations of February 22, 1855	297
I.55	Hamilton to Stewart (March 9, 1855)	357
I.56	Mississippi Chippewa to President, Secretary of Interior and Commissioner of Indian Affairs, December 24, 1855	366
I.57	Rev. S. Hall's Lecture, Sauk Rapids Frontiersman (April 8, 1858)	373
I.58	Walker to Thompson (September 25, 1861)	376
I.59	Interview between Commissioner Mr. W. Dole and the Chippewa Indians, February 17, 1863 (excerpts)	381
I.60	Morril to Thompson (October 1, 1864)	383
I.61	Stowe to Smith (September 8, 1876)	387
I.62	Stowe, Annuity Estimate for the Mille Lacs, etc. (1877)	388
I.63	Nelson Act Proceedings Senate Document 247, pp. 1-27, 45-48, 163-176	389
I.64	HR Ex. Doc. No. 247, 51st Cong., 1st Sess. (March 6, 1890), pp. 177-79	494
I.65	Additional Brief for the United States, *United States v. Thomas*, S. Ct. No. 14916 (1893)	504
I.66	Transcript Newspaper Articles	507

TABLE OF CONTENTS – Continued

		Page
I.67	Scott to Commissioner (April 17, 1897)	529
I.68	Letter December 16, 1898 Acting Commissioner of Indian Affairs to Heatwole	536
I.69	Meritt to Hammitt (December 9, 1925)	540
I.70	1926 letter Burke to Houle, etc., MN 14539-40	543
I.71	Burke to Hammitt (December 2, 1928)	545
I.72	April 30, 1934 letter from Collier to Reynolds	547
I.73	Letter, Zimmerman to Okonski, August 23, 1945, CCF 2940, Great Lakes 931, RG 75, NA	549
I.74	Defendant's Objections to Findings of Fact, etc., *Mole Lake Band v. United States*, Ct. Cl. No. 45162(I) (January 3, 1947), pp. 22-23	555
I.75	Defendant's Request for Findings, etc., *Mole Lake Band v. United States*, Ct. Cl. No. 45162(I) (July 23, 1948), pp. 164-65	559
I.76	Defendant's Objections to Findings, etc., *Mole Lake Band v. United States*, Ct. Cl. No. 45162(I) (March 1, 1954), pp. 20-21, 138a	562
I.77	Portions of Plaintiff's March 17, 1954, Objections to Defendant's Requested Findings and Brief, filed by the Chippewa with the United States Court of Claims (Docket No. 45162(I))	567
I.78	United States Motion to Dismiss in Part and Affirm in Part, *Besadny v. Lac Courte Oreilles Band*, S. Ct. No. 83-6 (September 1983), pp. 1, 12-13	574
I.79	Excerpt from November 17, 1987, *LCO* Deposition of James M. McClurken	578

TABLE OF CONTENTS – Continued

Page

Volume III

I.80 Report and Direct Testimony of Professor Charles E. Cleland for Plaintiffs (January 3, 1994) (excerpts) 581

I.81 Report and Direct Testimony of Professor Thomas Lund for Plaintiffs (January 3, 1994) 768

I.82 Report and Direct Testimony of Professor James M. McClurken for Plaintiffs (January 31, 1994) (excerpts)..... 828

I.83 Report and Direct Testimony of Professor John D. Nichols for Plaintiffs (January 3, 1994) 841

I.84 January 14, 1994, Affidavit of Dr. Roderick H. Squires, Landowners' expert Historical Geographer 863

I.85 Report and Direct Testimony of Dr. Helen H. Tanner for Plaintiffs (March 24, 1994) (excerpts) 867

I.86 Report and Direct Testimony of Dr. Bruce M. White for Plaintiffs (March 1994) (excerpts) 872

I.87 Page 6 of the March 30, 1994, Deposition of Herman Kegg..... 880

I.88 Pages 45, 78-79 of the March 31, 1994, Deposition of Brenda Boyd..... 882

Volume IV

I.89 Portions from the June 4, 1994, Amended Expert Witness Report, adopted and on file as testimony, of Dr. Donovan Hofsommer, Landowners' Expert Historian Witness..... 886

TABLE OF CONTENTS – Continued

Page

I.90 Testimony and Opinion by Rod Squires (excerpts) 903

I.91 Expert Report of Alan S. Newell (excerpts) ... 937

II. *Mille Lacs Band v. State* – 1994 Trial Testimony

II.1 Cleland Direct (excerpts) 1014

II.2 Cleland Cross (excerpts)..... 1046

II.3 Cleland Re-Direct (excerpts) 1081

II.4 White Direct (excerpts)..... 1094

II.5 White Cross (excerpts) 1113

II.6 Nichols Direct..... 1141

II.7 Nichols Cross (excerpts)..... 1166

Volume V

II.8 Tanner Cross (excerpts) 1195

II.9 Lund Cross (excerpts)..... 1200

II.10 McClurken Cross (excerpts) 1218

II.11 Kegg Direct..... 1221

II.12 Kegg Cross (excerpts) 1237

II.13 Boyd Direct..... 1241

II.14 Boyd Cross (excerpts) 1256

II.15 Dunkley Direct..... 1261

II.16 Dunkley Cross (excerpts)..... 1276

II.17 Newell Direct (excerpts)..... 1279

II.18 Newell Cross (excerpts) 1299

TABLE OF CONTENTS – Continued

Page

II.19 Driben Cross (excerpts) 1373

II.20 Driben Re-Cross (excerpts) 1390

II.21 Squires Direct (excerpts)..... 1393

II.22 Squires Cross (excerpts) 1417

II.23 Hofsommer Direct (excerpts) 1421

III. *Fond du Lac Band v. Carlson* – Documents Filed with 1994 Cross Motions for Summary Judgment re Fond du Lac Band's Treaty Rights

III.1 Doty to Cass, "Northern Wisconsin in 1820," VII Wisconsin Historical Collections, pp. 195-206 1452

III.2 Cleland, Report on the Hunting, Fishing and Gathering Rights of the Fond du Lac Band of Chippewa Indians (November 1, 1994), cover page and pp. 1-20, 92 and 112 .. 1470

III.3 Expert Report of Paul Driben, dated October 28, 1994, for *Fond du Lac Band of Indians, et al. v. Carlson, et al.*, #92-CV-159, *selected pages 1497

Volume VI

IV. *Mille Lacs Band v. State* – Documents Filed with 1995 Cross Motions for Summary Judgment re Wisconsin Bands' Treaty Rights

IV.1 March 7, 1836, letter from Lewis Cass to Martin Van Buren, President of the Senate .. 1510

TABLE OF CONTENTS – Continued

Page

IV.2 Extracts from letter dated June 4, 1847, from William Medill, Commissioner of Indian Affairs, to Commissioners Verplanck & Mix 1513

IV.3 Plaintiff's October 5, 1953, Request for Findings and Brief from *Mole Lake v. United States*. Court of Claims, No. 451620 regarding 139 F. Supp. 938 (Ct. C. 1956) 1515

IV.4 Portions of the July 1971 Additional Findings of the Indian Claims Commission in Docket 18-C, 22 Ind. Cl. Comm. 22, p. 45 .. 1523

IV.5 January 10, 1972, Pleading filed with the Indian Claims Commission by the Minnesota Chippewa Tribe, in Docket No. 18-S, regarding proposed Findings of Fact and Objections to Defendants' Proposed Findings of Fact 1525

IV.6 Portions of August 25, 1995, Affidavit of Berge Hansen, Landowners' Expert Real Estate Appraiser 1527

IV.7 Clifton, The Lac Courte Oreilles Band of Chippewa and the Treaties of 1837, 1842, and 1854: A Research Report (August 30, 1980) 1533

IV.8 Portions of August 26, 1995, Affidavit of James A. Clifton, Ph.D., Landowners' Expert Ethno-Historian 1615

IV.9 November 1, 1995, Supplementary Affidavit of Ethnohistorian James A. Clifton, Ph.D. 1640

TABLE OF CONTENTS – Continued

Page

V. *Mille Lacs Band v. State* – Phase II Stipulation

V.1 Stipulation and Exhibit D thereto (Protocols 1-5 and Attachment A to Protocol 5) (other exhibits omitted) 1727

Volume VII

VI. Consolidated Cases (*Mille Lacs Band v. State* and *Fond du Lac Band v. Carlson*) – Documents Filed with 1996 Cross Motions for Summary Judgment in Phase II

VI.1 Portions of October 1, 1891, Annual Report of the Commissioner of Indian Affairs to the two Houses of Congress..... 1785

VI.2 March 11, 1905, letter from the Commissioner of Indian Affairs to Senator Knute Nelson..... 1789

VI.3 Portions of 1913 letter from the Commissioner of Indian Affairs to James Goudy and Henry Sicade: Edward E. Hill, Compiler, *Guide to the Records in the National Archives of the United States relating to American Indians* (Washington: National Archives and Records Service, General Service Administration, 1981), page 178..... 1790

VI.4 April 23, 1920, letter from Commissioner of Indian Affairs, Cato Sells, to John Grasshopper, Fond Du Lac Band, Document Nos: 39624 – 1920 – Fond Du Lac – 115, CCF 1907 – 1939, BIA, RG 75, NA..... 1792

VI.5 Assistant Commissioner of Indian Affairs E.B. Meritt's letter of November 6, 1923, to James Bassett, 82333-1923-Consolidated Chippewa-115, CCF 1907-1939, BIA, RG 75, NA 1794

TABLE OF CONTENTS – Continued

Page

VI.6 1924 Circular of the Office of Indian Affairs' Counsel John R. T. Reeves, "Chippewa Indians Hunting and Fishing Rights", CA. 1924, 20940-Great Lakes-931, CCF 1907-1939, BIA, RG 75, NA..... 1796

VI.7 Assistant Commissioner of Indian Affairs E.B. Meritt's May 22, 1924, letter to J.A. Wakonabo, 3589-1924-Consolidated Chippewa-115, CCF 1907-1939, BIA, RG 75, NA .. 1799

VI.8 May 5, 1926, letter from Commissioner of Indian Affairs, Charles H. Burke, to Louis Aynemahsung, Frank Barney, Mike Houle, 21115-1926-Consolidated Chippewa-115, CCF 1907-1939, BIA, RG 75, NA..... 1801

VI.9 Assistant Commissioner of Indian Affairs, E.B. Meritt's October 15, 1926, letter to J.A. Wakonabo, 43033-1926-Consolidated Chippewa-115, CCF 1907-1939, BIA, RG 75, NA .. 1803

VI.10 Superintendent to Commissioner (December 14, 1928)..... 1804

VI.11 September 13, 1929, letter from Assistant Commissioner of Indian Affairs, J. Henry Scattergood, to Senator Henrik Shipstead ... 1806

VI.12 February 3, 1932, Department of the Interior Circular Authored by Commissioner of Indian Affairs John Collier, entitled "Hunting and Fishing by Indians, and by other on Indian Reservations", Box 62, Decimal correspondence file 105-124, Consolidated Chippewa, BIA, RG 75, NA-CPR 1808

TABLE OF CONTENTS – Continued

Page

VI.13 April 5, 1934, Opinion of United States' Solicitor Margold, *as cited in* the March 2, 1942, Reply Brief of the Appellee in *Tulee v. Washington*, 315 U.S. 681 (1942)..... 1813

VI.14 The Assistant Secretary of Interior's letter of January 26, 1938, to the Attorney General of the United Sates, 20940-Great Lakes-931, CCF 1907-1939, BIA, RG 75, NA .. 1823

VI.15 July 29, 1938, letter from F. H. Daiker, Assistant to the Commissioner of Indian Affairs, to J. C. Cavill, Superintendent, Great Lakes Agency, 43931-1938-Great Lakes-931, CCF 1907-1939, BIA, RG 75, NA .. 1831

VI.16 July 8, 1939, letter of Assistant Commissioner of Indian Affairs, William Zimmerman Jr., to Representative Harold Knutson, 41544-1939-Consolidated Chippewa-931, CCF 1907-1939, BIA, RG 75, NA..... 1835

VI.17 Portions of February 13, 1942, Brief for Appellant filed with the United States Supreme Court in *Tulee v. Washington*, 315 U.S. 681 (1942)..... 1837

VI.18 Portions of a December 28, 1984, Brief for the Respondent, Klamath Tribe, filed with the United States Supreme Court in *Oregon Fish & Wildlife Department v. Klamath Tribe*, 473 U.S. 753 (1985)..... 1846

VI.19 Portions of the February 7, 1996, Rebuttal report of the State's expert Historian, Alan S. Newell, adopted as testimony..... 1864

VI.20 Portions of Dr. Roderick H. Squire's Phase II Expert Report, adopted and filed as testimony 1901

TABLE OF CONTENTS – Continued

Page

VII. Consolidated Appeals – Documents Included in Appendices Filed in the Eighth Circuit Court of Appeals, But Not Filed or Submitted in the District Court

VII.1 Treaty with the Wyandot, Etc., 1805, 7 Stat., 87 1928

VII.2 Treaty with the Quapaw, 1818, 7 Stat., 176 .. 1933

VII.3 Treaty of September 21, 1832, 7 Stat., 374... 1938

VII.4 Treaty of May 13, 1833, 7 Stat., 424..... 1946

VII.5 Treaty of October 9, 1833, 7 Stat., 448 1952

VII.6 1856 COIA Report, *selected pages 1956

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed petition for certiorari:

VOLUME I

Mille Lacs Band of Chippewa Indians v. Minnesota, 124 F.3d 904 (8th Cir. 1997).....App. 1

Mille Lacs Band of Chippewa Indians v. Minnesota, 952 F. Supp. 1362 (D. Minn. 1997) (*Mille Lacs IV*).....App. 74

VOLUME II

Mille Lacs Band of Chippewa Indians v. Minnesota, unreported, No. 3-94-1226 (D. Minn. Mar. 29, 1996) (*Mille Lacs III*).....App. 164

Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F. Supp. 784 (D. Minn. 1994) (*Mille Lacs II*).....App. 212

TABLE OF CONTENTS – Continued

Page

Mille Lacs Band of Chippewa Indians v. Minnesota, 853 F. Supp. 1118 (D. Minn. 1994) (*Mille Lacs I*) .....App. 351

VOLUME III

Fond du Lac Band of Chippewa Indians v. Carlson, unreported, No. 5-92-159 (D. Minn. Mar. 18, 1996).....App. 419

Mille Lacs Band of Chippewa Indians v. County of Aitkin, Order, Nov. 17, 1997 (8th Cir. 1997)..App. 482

U.S. Const., Art. I, Sec. 8, Cl. 3.....App. 483

U.S. Const., Art. VI, Cl. 2.....App. 483

U.S. Const., Amend. X.....App. 483

Treaty with the Chippewa, July 29, 1837, 7 Stat. 536.....App. 484

Treaty with the Chippewa, September 30, 1854, 10 Stat. 1109 .....App. 490

Treaty with the Chippewas, February 22, 1855, 10 Stat. 1165 .....App. 502

Act of May 11, 1858, 11 Stat. 285 .....App. 515

Act of February 26, 1857, 11 Stat. 166.....App. 517

Act of September 30, 1850, 9 Stat. 544 .....App. 522

Act of February 27, 1851, 9 Stat. 570.....App. 528

Act of December 19, 1854, 10 Stat. 598.....App. 532

Act of January 14, 1889, 25 Stat. 642, entitled "An act for the Relief and Civilization of the Chippewa Indians in the State of Minnesota" (Nelson Act) .....App. 535

TABLE OF CONTENTS – Continued

Page

H.R. Exec. 51-247-1890, Message of President Benjamin Harrison, March 4, 1890.....App. 545

Patent Issued by President Cleveland for One Petitioner's Property In The Minnesota Portion of the 1837 Ceded Territory .....App. 548

Indian Claims Commission Act, 60 Stat. 1049 (1946), codified at 25 U.S.C. § 70 et seq. (now repealed).....App. 550

Executive Order, President Zachary Taylor, February 6, 1850.....App. 565

Minnesota Territorial Resolution of October 11, 1849 .....App. 566

Chap. XIX, An Act for the Protection of Game .....App. 569

Chap. XLIV, An Act to extend the laws of the State over all the Indian Tribes within the boundaries of the State, and to confine them to their own lands.....App. 570

Chap. XLV, An Act for the Protection of Trout Fish.....App. 573

Letter, President Roosevelt to G. Whitebird, March 1, 1938.....App. 575

Portions From The June 4, 1994, Amended Expert Witness Report, Adopted And On File As Testimony, Of Dr. Donovan Hofsommer, Landowners' Expert Historian Witness

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

* * *

Articles of Confederation and then the new republic both faced the ongoing need to formulate land policy and provisions for government service in the trans-Appalachian West.[10]

The Confederation took up the matter in 1784 and produced a general plan supplemented by the Ordinance of 1785. This provided for the systematic survey and sale of lands west of New York and Pennsylvania and north of the Ohio River – a broad area that was to be laid out in townships of six miles and subdivided into 640-acre lots. Two years later came the Northwest Ordinance (or Ordinance of 1787) which provided for political organization of the same region with federally appointed territorial governors as part of preparation for statehood. Collectively this legislation opened up land for settlement while simultaneously raising income from land sales to reduce the federal debt. The Ordinances of 1785 and 1787 were also the codification of Euro-American colonization experience since 1607 in which successive generations had learned to live on the land while developing institutions to meet their needs.[11]

Provisions for the vast reaches of the Northwest seemed to guarantee free and easy movement of an

agricultural society into this new part of the promised land. Yet there remained a problem: Indians. Friction had typified relations between Indians and whites elsewhere. It would be no different in the Northwest. Indians, most whites believed, were savages, and savagery was equated with hunting and gathering, communal ownership, paganism, oral tradition, and emotion whereas civilization equated to agriculture, private property, Christianity, literacy, and reason. Indians, whites pointed out, relied on hunting and gathering – a totally inadequate use of the land compared to farming. In fact, whites affirmed, Indians wasted resources and were, in fact, greedy by selfishly locking up huge tracts of land only for themselves. On the other hand, appropriate use of land by the plowman under private ownership would make fertile and productive these virgin territories. Whites, it was clear, had the ability to conquer nature through husbandry.[12]

Indian policy under the federal government expectedly derived from the colonial experience. By 1755, the British had assumed direct control of Indian relations, essentially carving out two huge preserves – one north of the Ohio River and the other south thereof – with agents for each. The English recognized that Indians had possessory rights which they would be obliged to satisfy. Moreover, Indian title could be extinguished only in a formal and legal way as was the requirement of a superior and civilized nation.[13]

This intellectual framework informed federal policy from the beginning. Under the constitution the central government assumed responsibility for Indian relations and Congress appointed the Secretary of War to supervise

Indian affairs. The government acknowledged that the Indian had right of prior occupancy and Henry Knox, the first Secretary of War, noted that Indian lands would not be taken unless by free consent or by right of conquest through a just war. Superintendents and agents were authorized for administrative purposes over perhaps 40-50,000 Indians north of the Ohio and approximately 75,000 to the south.[14]

The size and scope of Indian policy would change markedly by acquisition of the Louisiana Territory in 1803. Basic principles, however, changed little. President Thomas Jefferson devoutly hoped for an American agrarian republic, a nation of small farmers and shopkeepers, with political and economic power broadly dispersed. That potential could be dramatically advanced only if the United States could expand its borders – a possibility that matured when Spain receded to France the old French claim west of the Mississippi to the Rockies, and as Napoleon's fortunes waned. The long and the short of it was sale to the United States of nearly 830,000 square miles in 1803.[15]

Jefferson may have brooded that the constitution made no express provision for adding territory, but he rejoiced at the nearly limitless possibility offered by the new western lands for independent and hard-working farmers fully vested and supported by their own real property. They would have a stake in society and thus anchor the republic. But again: the Indian problem. Prevailing wisdom held that a protracted period of time – decades, maybe centuries – would be required for Americans to fill up the new land, so Jefferson saw no inconsistency in providing lands in Louisiana Territory for

Indians then living east of the Mississippi who now would be under increased pressure to remove themselves westward. Other Americans, of a more humanitarian bent, also favored removal because it would separate Indians from the corrupting influence of white society. Thus Jefferson had general support when he urged that part of the Louisiana Purchase be put aside for eastern Indians; Congress agreed in 1804.[16]

The War of 1812, presumably a fight for "Free Trade and Sailor Rights," was in many ways more a war to guarantee early and easy settlement of the West. The British, after all, had proved obdurate about leaving the Old Northwest where military personnel attempted to keep peace among Indians and thus encourage maximum trade by Indians with British-owned Hudson's Bay Company and the North West Company. This clearly encouraged Indians to resist removal and angered settlers and potential settlers who always saw it as an inalienable right to move onto the public domain. Although the war produced no clear victor, it did alter British perspective in a positive way. This incredible American attempt as [sic] self-government, the British concluded, might just succeed; the United States of America might be a successful experiment. Change came through diplomatic channels; the British left the Old Northwest in due course and even agreed to conditions defining the border between the United States and Canada. Indians were not naive about any of this. Absent British interest their case was hopeless. Presidents Madison and Monroe, who followed Jefferson, agreed with his Indian policy and in 1817 the federal government proceeded with removal. Before 1830,

Ohio would be nearly devoid of Indians as would be Indiana and Illinois.[17]

Whether Americans understood it or not, the country at the end of the war of 1812 was poised for astonishing change. The at least for white males. Earlier tradition held that only white, male owners of land property had a stake in society and thus the right of franchise. This view began to give way early in the nineteenth century and voting criteria gradually moved to a simple payment of taxes – a policy that took full flower during the era of the common man. This broadening of participation, this feeling on the part of ordinary people that they need no longer "defer to their betters," this notion that common people were as good as any other certainly had an impact on the political process. Such was predictably clear in the matter of law pertaining to the public domain. Land, after all, remained the nation's most sought-after commodity. The Ordinance of 1785 had provided for management and sale of the public domain, but settlers found it inadequate and unattractive, complaining that it benefitted unscrupulous speculators. The government was buffeted by opposing forces – those wanting early sale in large blocks to generate income useful in paying down the national debt and those wanting land surveyed and opened only as older areas were claimed and made productive. In the end the government did not make huge grants to influential persons and neither did it embrace a headright system of free grants to free men. Rather the government groped for middle ground with Congress passing a blizzard of 375 land laws between 1789 and 1834 with the burden of administration vested in the General Land

Office, a branch of Treasury, where in 1812 a mere fourteen persons were responsible for surveying, sales, and granting patents. Total land offices to meet local needs were only 21 in 1818, 36 in 1822. Paucity of government services in this matter reflected a curious contradiction: citizens expected much but resisted paying for it.[29]

Agitation for an increasingly "cheap and easy" policy that recognized an "I got here first" or prior claim argument grew exponentially as frontiersman increased in number and as the common man perspective bloomed. Unfortunately, an orderly survey process did not or could not keep up with demand and settlers simply "squatted" irrespective of legal niceties. The federal government was understandably loathe to use military might to enforce law and expel squatters, but when it failed in enforcement disrespect followed. And settlers often argued their case at a lofty level – that it was their "natural right" as citizens to hold that part of the public domain meeting their needs. In any even [sic], the Preemption Act of 1830 provided that any settler who had cultivated any part of the public domain in 1829 was qualified to enter up to 160 acres at $1.25 per acre. In effect the law also constituted a pardon for all who had settled illegally on the public domain – thereby encouraging illegal settlement. Agitation continued and following the earnest efforts of three presidents – Jackson, Van Buren, and Harrison – Congress passed the Preemption Act of 1841 – a reward to squatters – recognizing that settlement prior to purchase was no longer trespassing. Now settlers could legally "squat" on up to 160 acres and when that land was opened to purchase acquire it without competitive bid at the government's minimum price. The 1841 law showed that

Congress now viewed settlement of the public domain as more important than a means of raising revenue, that the public preserve should be settled in small parcels to the betterment of the largest number, and that settlers should have a reasonable time to make full payment.[30]

The rapidity with which the American people spread westward was truly astonishing. The population of 150,000 Americans west of the Appalachian Chain in 1795 grew to more than 1,000,000 in 1810. Under tenets of the Ordinance of 1787 and the federal constitution statehood followed for Vermont (1791), Kentucky (1792), Tennessee (1796), Ohio (1803), and Louisiana (1812). The War of 1812 created a temporary uncertainty but following that conflict began what some historians have labeled "The First Great Migration." Land, as always, was the primary lure, but good times and rising prices for agricultural staples were also important factors. So, too, was a crucial imponderable: Dissatisfaction with one's location or circumstance compared with what one saw as relative advantage in the West. Much of the flow followed the central route through Pittsburgh or Wheeling to the Ohio River. Indeed, Ohio with 581,434 persons was the most populous state west of the mountains in 1820 – and Ohio's population would nearly triple before 1840. It was typical. Westerners in 1820 were less than a quarter of the American population, but in 1840 were a third. More new states followed: Indiana (1816), Mississippi (1817), Illinois (1818), Alabama (1819), Main [sic] (1820), Missouri (1821), and Arkansas (1836). Into these places flowed a prodigious number of newcomers. By 1820 indiana had a population of 147,178, Illinois 55,211, and Missouri 66,586. The surge went unabated. Missouri, for example, saw its

population increase by seventy-five percent for each of the next two decades. In 1836, the federal government sold over 20 million acres of the public domain, receiving in exchange more than 25 Million Dollars, and by 1840 the demographic center of the American population had moved to just south of the Pennsylvania-Ohio border in far-western Virginia.[31]

Not all who went west set their caps on a lifetime in husbandry. Many became urban dwellers. Pittsburgh dominated the upper valley of the Ohio; Louisville prevailed in Kentucky; and, Cincinnati, where the predominant industry was pork packing, bid fair to become "Queen City of the West." To the north, along the Great Lakes, grew cities such as Erie, Cleveland, Toledo, and Detroit. All of these showed dramatic growth between 1820 and 1850. Pittsburgh and Cincinnati are examples: Pittsburgh's population increased from 7,000 in 1820 to 46,000 in 1850, while Cincinnati surged from 9,000 to 115,000 in the same years.[32]

In the central heartland, St. Louis, because of its strategic location on the Mississippi just south of the confluences with the Illinois and the Missouri and above the confluence of the Ohio, boasted an early domination of a huge hinterland. About 1,200 miles upstream from New Orleans, St. Louis dated from 1764 when Frenchmen set up business at that location. Trade tentacles spread widely – to Prairie du Chien, to New Orleans, and even to Montreal. Following the Louisiana Purchase, the federal government took control at St. Louis on March 9, 1804, and by 1820 the city's population was 4,598. Prominent observers forecast great things for St. Louis and its claim as "The Gateway City" was hard to dispute with its

levees a constant fever of activity where riverboat cargoes were unloaded, loaded, or transloaded. Just as New York City used the Hudson and Mohawk rivers with the Erie Canal for its economic purposes so did St. Louis utilize the Mississippi and its tributaries in same fashion. By 1840, St. Louis provided about half the marketing and supply needs of Illinois and St. Louis denizens already took pride at trade inroads made in what would become the states of Iowa, Wisconsin, and Minnesota.[33]

It would be Chicago, however, that came to fullest dominance in the midcontinent. Chicago, too, was strategically located – at the base of Lake Michigan and thus at the farthest inland point to take advantage of water transportation to and from the Atlantic. The U.S. Army built Fort Dearborn near where the Chicago River flows into Lake Michigan in 1803, and trade was undertaken in the area by American Fur Company; but it was not until 1830 – well after Illinois statehood – that Chicago took form. Its population growth was phenomenal, as was its commercial growth. In 1850, for example, St. Louis handled at least twice as much wheat and flour as Chicago, but in five years time the youthful upstart would far surpass St. Louis in handling these commodities. For that matter, during the first half of the 1850's western trade was generally reoriented on an east-west axis as net eastward movement favored the Great Lakes over New Orleans. Chicago, even more than St. Louis, now stood at the intersection of producer and consumer – but both of them before the Civil War ranked among the top ten cities in the nation based on population, St. Louis ranking seventh with 160,773 and Chicago eighth with 109,260.[34]

Many of those who swelled the population of American cities at this time were foreign born. Migration to the new world was hardly a new trend but in these years oppression, war, food shortages, and other factors motivated an unprecedented number of persons in northern and western Europe to consider leaving home. The timing was good. The United States had an essentially open immigration policy coupled with an easy land policy, the American economy was growing with great opportunity for industrial work, the "Indian menace" was being taken care of, internal transportation was available at lower cost than earlier, and steam technology was expanding trans-oceanic carrying capacity and speed of passage at reduced fares. During the year 1820 some 128,502 foreigners emigrated to american shores, but in the decade of the 1850's a staggering 2.8 million arrived to take up new lives. They were Irish, Germans, English, Welsh; they were Protestants, Catholics and Jews. And for the most part their values and goals mirrored established American values and goals – perhaps the most noteworthy of which was to "conquer the West" and make it productive, whether that West be a countryside or the city.[35]

From the early colonial days had grown the idea that Americans were a special people with a special pu. pose. In 1771, Philip Freneau, a young Princetonian, sang in "The Rising Glory of American" of a time sure to come " . . . when Britain's sons shall * * * Chien and the other to LaCrosse. In any event, before the decade was out rails were as far west as St. Joseph, Missouri, the Mississippi had been bridged between Rock Island and Davenport,

and five separate Chicago-oriented companies operated 650 miles of line within the state of Iowa.[41]

It was the railroad more than any other single variable that would establish Chicago as a great center for grain handling, lumber marketing, and eventually meat packing. The railroad was also a primary factor in fueling the national industrial revolution and the central factor in forging a national economy. Foreign trade still loomed large in the American economy, and prodigious volumes of cotton, tobacco, and wheat still moved to European ports, but the United States was no longer dependent on such activity. Indeed, foreign trade before 1860 was overshadowed by domestic commerce. The great cities of the eastern seaboard paid close attention to foreign trade, but increasingly the barometer of business was calculated at the railroads' freight and passenger stations rather than on the docks and wharfs. The barter economy was essentially extinct. Banking and finance had become integral parts of the American economic landscape while factories divorced manufacturing from marketing. At the same time transportation companies largely had become common carriers.[42]

All of this, in one way or another, had impact on the area contiguous to what would become the state of Minnesota. Michigan had gained statehood in 1836 – growing in population from 31,639 in 1830 to 212,267 in 1840 and 397,654 in 1850, reflecting in the process the "Second Great Migration" of 1830-1850. The onrushing wave of white humanity continued westward. As Indian titles

were extinguished, as land law changed, as transportation became easier and more efficient, and as the population increased Iowa and Wisconsin became the new target areas for such movement.[43]

Lying above Missouri and west of Illinois, Iowa was a lush, Well-watered region with untold agricultural potential. It could be reached by marvelous natural highways – the Mississippi and the Missouri – and it could be penetrated by the Des Moines. A paltry population of 10,531 in 1836 grew to 75,152 in 1844 as pioneers moved in from Ohio, Indiana, Pennsylvania and other established states and were joined by foreigners from England, Ireland, Germany, Holland, and France who likewise rushed to verdant heartland. Statehood followed in 1846. Four years later farmers in Iowa produced 8.6 million bushels of corn – an unmistakable confirmation of the state's marvelous agricultural promise.[44]

The early permanent white population in Wisconsin stretched from present-day Milwaukee westward to what became Waukesa and northward to the future community of Appleton. Many of these persons derived from New England states and New York, but Europeans, especially Germans and then Scandinavians, also found homes there. Agriculture predominated, but Wisconsin's fine timber also attracted the axeman who found a ready market in nearby Chicago. The area additionally attracted miners to the lead deposits in the southwest near Mineral Point. Territorial status dated from 1836 when the population stood at 22,000; statehood followed in 1848. By 1850, 300,000 persons resided in Wisconsin with a huge surge to follow in the decade of the 1850's.[45]

Soon it would be Minnesota's "turn" for territorial status and then statehood. Land east of the Mississippi in the future state had become part of the public domain in 1783 following the War for Independence, and the rest had come under American ownership by way of the Louisiana Purchase in 1803. The famous Lewis & Clark Expedition up the Missouri and beyond was followed by Zebulon Pike's assignment up the Mississippi in 1805-1806; it was Pike who treated with the Dakota for land later used as part of Fort Snelling. When that military installation was finally completed in 1824 a small group of whites who engaged in trade lived nearby at Mendota and other whites – traders, trappers, missionaries, soldiers of fortune – were scattered about the region. That simple pattern would change quickly and for diverse reasons. The trapping-trading barter economy which had typified the region for decades was declining as European styles changed and "Beaver Fever" passed. This important alteration took place just as interest developed in one of the region's great but as yet untapped resource: Timber. Construction of a lumber mill at Marine-on-the-St. Croix in 1839 and the establishment of Stillwater as a lumbering center shortly thereafter symbolized the passing of one era and the beginning of another.[46]

Change came ever so quickly. By 1840, more than one out of three Americans lived in the trans-Appalachian West; that westward press had finally reached the Upper Mississippi Valley. Treaties with the Ojibway and Dakota in 1837 were ratified in 1838 and the first Minnesota "land rush" was on. In 1846, a post office was established in St. Paul; in 1847, regular steamboat packet service was

initiated to the "head of navigation" at St. Paul; and, in 1848, logs were first milled at St. Anthony Falls. All of this implied a boom, but in reality fewer than 4,000 whites lived in the area that eventually became the state when a tiny delegation met at Stillwater in August of 1846 to prepare a memorial asking Congress for territorial status. It was done on March 3, 1849; Alexander Ramsey, a 34 year old Pennsylvanian was named territorial governor.[47]

In his inaugural remarks on September 4, Ramsey revealed himself as a classic frontier booster when he blithely forecast that Minnesota would be "peopled with a rapidity exceeding anything in the history of western colonization." Make no mistake, however; Ramsey was in earnest. Yet if his prediction were to come true one thing had to happen first: the Indian had to go. Not surprisingly, Ramsey and other Minnesota leaders worked to that end. Important removal treaties with the Dakota in 1851 and with the Ojibway in 1854 and 1855 came in predictable train. In these instruments, the federal government extinguished Indian title to large blocks of Minnesota Territory, but no matter how important locally these arrangements were merely the latest installment in a removal story begun much earlier and one that had many more years to run.[48]

Timing was important. Early in 1854, the Chicago & Rock Island Railroad became the first to reach the Mississippi River (at Rock Island, Illinois), and to celebrate this momentous event a gala rail-water excursion in June brought perhaps 1,200 prominent guests from around the country to Chicago and then on to St. Paul. Glorious reports of Minnesota's grandeur and the ease by which

travelers could now reach the territory flowed into print and added to a growing interest in the area. And, as it turned out, interest in Minnesota Territory dovetailed with a dramatic increase in western land sales – over fifteen million acres in 1855 alone.[49]

Minnesota Territory was assuredly a part of that boom; 5.25 million acres in the territory were sold from the public domain in the years 1854 through 1857. This was reflected in the territory's population, which rose from 20,000 in 1852 to 150,000 in 1857. These newcomers arrived in descending numerical order from the Middle States, the Midwest, New England, and Europe – a rather predictable pattern for the time.[50]

Many of these new residents came to harvest rich timberlands (perhaps two-thirds of what became the state was covered with commercially valuable timber), but others came to till the soil. After all, westerners often judged the richness of the land by the quality of its forest. In fact much of the region was well blessed with Ice Age gifts including flat to rolling land with fertile soil and easy corridors for movement. The husbandman found it, much of it at least, extremely attractive, and as the farmer came so too came the wheat culture. And the farmer came to stay – plowing the ground, sowing the seed, fending the land, bespeaking in all cases

* * *

Hofsommer – Summary and Conclusion

National settlement patterns and directions were firmly established by 1800, and this inexorable process

continued westward with the Louisiana Purchase in 1803. These patterns were not simply of human movement; these were also the movement of ideas, ideals, and values. Thus the westward movement of the American people was an amalgam of economic, social, cultural, and political variables and qualities. These westerners gained political potency as their numbers grew, as Americans subscribed more fully to a common man philosophy, and as Americans embraced Manifest Destiny as an article of faith.

In this process, land registration and Indian policy became inextricably linked – both, of course, the logical result of evolving with shifting public sentiment. Government policy would reflect a tightly held grassroots sentiment – that the country should be "settled up" as rapidly as possible. And that term meant *permanent* – not transitory – settlement. Indian policy vacillated, first emphasizing assimilation and then segregation and removal, and Indians on occasion were granted temporary concessions. But these concessions, held by broad public sentiment (particularly on the frontier), were not to impede the orerarching [sic] policy of permanent white occupancy.

The ordinary frontiersman may not have had a sophisticated understanding of law. But the ordinary frontiersman did have a common and profound dedication to the concept of private property and the rights thereof. For example, their claim, they would demand, was theirs *alone*; their claim was not divisible, not to be shared. In this regard, a fence of any type demarcated a claim to land or a claim to title; anybody who came onto that claim uninvited or who was otherwise unwelcome could be considered a trespasser. "Possession is $^{9}/_{10}$ths of

the law" may not have or may not had courtroom validity, but frontier people certainly embraced the concept. In the popular view, squatters had rights rivalling those who held clear title; their rights were tightly moored to the doctrine of first arrival ("I got here first!"). And against any aboriginal claim, white claims were held clearly superior because, whites fully believed, their principles and purposes were clearly superior.

Minnesota, in a very real way, was a case study in the American westering process. Territorial status and the several treaties of removal sent a very clear message to prospective white settlers: The "Indian Problem" in Minnesota was solved and the region was now open and available to permanent settlement. The result was predictable. It was as if flood gates had been opened. The new arrivals came in droves, moving from southeast to northwest with greater density of population predictably in the southeast quadrant but with full and reasonable expectation that the entire region would be occupied in short order. No part of the territory or the future state would be bypassed – not even the dense forests, for prevailing wisdom held that the "plow follows the axe," in other words, that land fertile for timber was land fertile for crops.

* * *

Testimony And Opinion By Rod Squires (Excerpts)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

* * *

living throughout the Old Northwest Territory, a jurisdiction encompassing the modern states of Ohio, Michigan, Illinois, and Wisconsin, as well as the easetrn [sic] part of Minnesota, treaties in which the Indians ceded land. Partly responsible for such treaties, and reacting to the land cessions they included, non-Indians migrated westwards, demanding both the right to own land and the right of self-government. For over a half century Congress promoted and subsidized such migration and divided the Old Northwest into separate sovereign states that became settled by individuals who became owners of the land which they occupied and used. To argue that the treaty of 1837, in which the Ojibwe in Wisconsin Territory ceded land, is different from all of the previous treaties, and thus the expectations of those non-Indians who acquired land in the ceded area were different, because their titles were impressed with the privilege of Indian hunting and fishing rights, violates the basis of self-government and land ownership.

Indian Treaties and Land Alienation.

Each treaty contains language different from the language in any other treaty, language that reflects the relationships and unique concerns of the individuals who negotiated, signed, and ratified it, language that imposed obligations on the government and Indians while giving

both parties certain expectations regarding the future behavior of each. The purpose of each treaty was identical, however, to diminish the area occupied and used by Indian tribes and to allow non-Indian settlement and other forms of land use to expand. Each was part of a land alienation process in which the federal government acquired and conveyed title to vast areas of the United States, transferring the obligations and expectations relating to land ownership it had acquired under the various treaties to individuals, corporations, and states (Figure 1). In each treaty the federal government retained all of the Constitutional obligations regarding American Indians themselves, however.

Individual treaties cannot be considered in isolation. The relationships between the federal government and particular Indian tribes that determined the language in a specific treaty were similar, although not identical, to the relationships between the government and all tribes, relationships that characterized federal Indian policy. A specific treaty was the instrument that effected the policy of the federal government towards American Indians especially regarding the land they occupied and used. Individual treaties furthered the land alienation policy, a policy aimed at settling a continent. Each represented a stage in the evolution of the relations between the federal government and particular Indian tribes and reflected existing relationships between Indians and non-Indians in a particular area. Each also represented a stage in the spread of government and non-Indian land ownership in a particular area, thus characterizing a stage in the settlement of the United States, a stage characterized by expectations on the part of those who acquired title to land in a

particular area. In addition each treaty reflected the consequences of previous treaties and anticipated future treaties. Making treaties with American Indians was merely one facet of national policy regarding the settlement of the continental interior. As Congress enacted statutes that had an impact on landownership and settlement so the language of subsequent treaties were altered.

A clear example is given in the language of the treaties of 1854 and 1855. In both, missionaries and others already living in the ceded areas "by authority of law" were allowed to acquire title to 160 acres of land. The stipulations regarding what land could be acquired were different in the two treaties, however. In the 1854 treaty only land that had been first surveyed could be acquired (10 Stat. 1109).

In 1855 the restriction was dropped and non-Indians could acquire land that had not been surveyed (10 Stat. 1155). This was because Congress had enacted legislation in 1854 allowing individuals in Minnesota pre-emption privileges – the right to acquire title to the land on which they had settled before anyone else – on unsurveyed land. In the 1854 treaty there was no language prohibiting non-Indians from acquiring title to land in the reservations that were established. Since non-Indians could only acquire land that had been surveyed, and there was none inside the reservation boundaries, such a possibility did not exist. In the 1855 treaty, however, non-Indian were specifically excluded from acquiring lands on reservations, a necessary stipulation given the fact that unsurveyed lands could now be acquired.

In the final analyis [sic] the language of individual treaties which reflect the "mix" of relations that existed in American society at that time can be linked to several arenas of domestic national policy. In each treaty the federal government attempted to further the principles of Indian policy, principles that had evolved since the United States had became a separate sovereign government, and the representatives of the Indian tribes tried to further their interests in the light of the status of their tribe. In each treaty the federal government also tried to further the principles of land alienation policy, also principles that had evolved since the United States had became a separate sovereign government, a policy that included acquiring title to American Indian land, surveying that land, and conveying title to other legal entities. This land alienation policy was necessarily linked to the spread and development of government units in the United States.

An Overview of Non-Indian Settlement

The migration of individuals from one place to another and the spread of the institutions that control their behavior, government, is key to understanding the history of most societies.

> The movement of people . . . was more than simply the migration of individuals from one place to another. It involved partly the transference of an old society, partly the creation of a new one (Rohrbough, 1978 5).
>
> Government established a framework within which men pursued their interests in an orderly fashion, following generally accepted rules of

> behavior. Those who deviated could be confined and punished. A legal code regulated personal conduct and encouraged people to risk their capital. The amorphous, random, chaotic world of the early frontier had to be fashioned into some sort of viable society (Rohrbough, 1978 41).

Critical to such migration in the United States, providing a stimulus for the movement of individuals into the area north of the River Ohio not under the control of any existing government, was the extension of the authority contained in written statutes, rules, and judicial opinions stemming from the Northwest Ordinance, the Federal Constitution, and a plethora of legislation relating to real property (Figure 2).

> To this fertile and open land in the years immediately after 1815 came one of the great immigrations in the history of the western world. In numbers of people, land occupation, and impact on the nation, it far exceeded anything experienced on the early trans-Appalachian frontier (Rohrbough, 1978 158).

Such extension was a necessary concomitant to settlement as the government sought to attract immigrants and to regulate the relationships between and among American Indians and migrating European Americans.

Under the authority contained in Section II Article III of the Constitution Congress and the federal real estate agency, the General Land Office, conveyed title to the lands it had acquired from foreign nations, including American Indian tribes, commonly called the public domain, to individuals, corporations, and states. By controlling this land alienation process, Congress defined

and initiated land ownership by describing what land could be owned, who could own it, and how it could be owned and thus influenced the speed and direction of migration.

> As it had been for generations past, land was the lure, and the flood of new settlers experienced the operation of a land system moving at last beyond the experimental stage, and administrative mechansim [sic] that could place vast quantities of public lands on the market. Military bounty lands for veterans in Illinois, Arkansas, and Michigan also attracted prospective settlers to the western country. Added to these inducements were prosperous times, rising prices for staple agricultural products (especially cotton), and a banking system that was almost as democratic as the dominant political philosophy of the day (Rohrbough, 1978 159).

There is an intimate and largely reciprocal relationship between government and land ownership and the characteristics of this relationships are key to understanding the spread of people and governments across the continent and the development of an American society. Using the prospect of owning land as a stimulus to draw migrants westwards, the federal government created both a need for subnational state governments and a means for these governments to survive. Congress established territorial and state governments and subsidized them directly through grants of land and grants of money, some of which was based on the proceeds from the sale of the public domain in the state. In addition, Congress subsidized these states indirectly by granting land to transportation companies, for example those which built roads, railroads, and canals and improved river courses, subsidies that also served to attract migrants.

Of considerable concern to the individual who ultimately acquired title to parcels of land, either directly from the federal government or through intermediaries, such as corporations and states, was the ability of territorial and state governments to guarantee and protect land titles (Figure 3). Of equal concern, perhaps, was the ability and willingness of territorial and state governments to regulate land use, initially through a property tax, later through a tax on the products of land use, and later still through various subsidies and regulations. The settlers institutional needs were in response to physical need – protection from Indians, land titles, communications, and a market for any surplus commodities. Where there were few settlers, or rather where there were few opportunities to own land, there was little need for government.

Of concern, here, is the spread of government and land ownership in the area between the St. Croix and Mississippi rivers, ceded by the Ojibwe in 1837 (Figure 4). At this time the area was part of Wisconsin Territory, created the previous year out of Michigan Territory, a territorial government patterned on the provisions contained in the Northwest Ordinance enacted 50 years previousl [sic] (see Pease, 1925, 1938). As a consequence the treaty was negotiated by the Governor Dodge of the Territory who was also Superintendent of Indian Affairs.

A brief discussion of the evolution of government throughout the larger area affected by this Ordinance provides a backdrop to the understanding the nature of government in the area that was ceded in 1837, giving some idea of the etiology of the early law governing the relationships of

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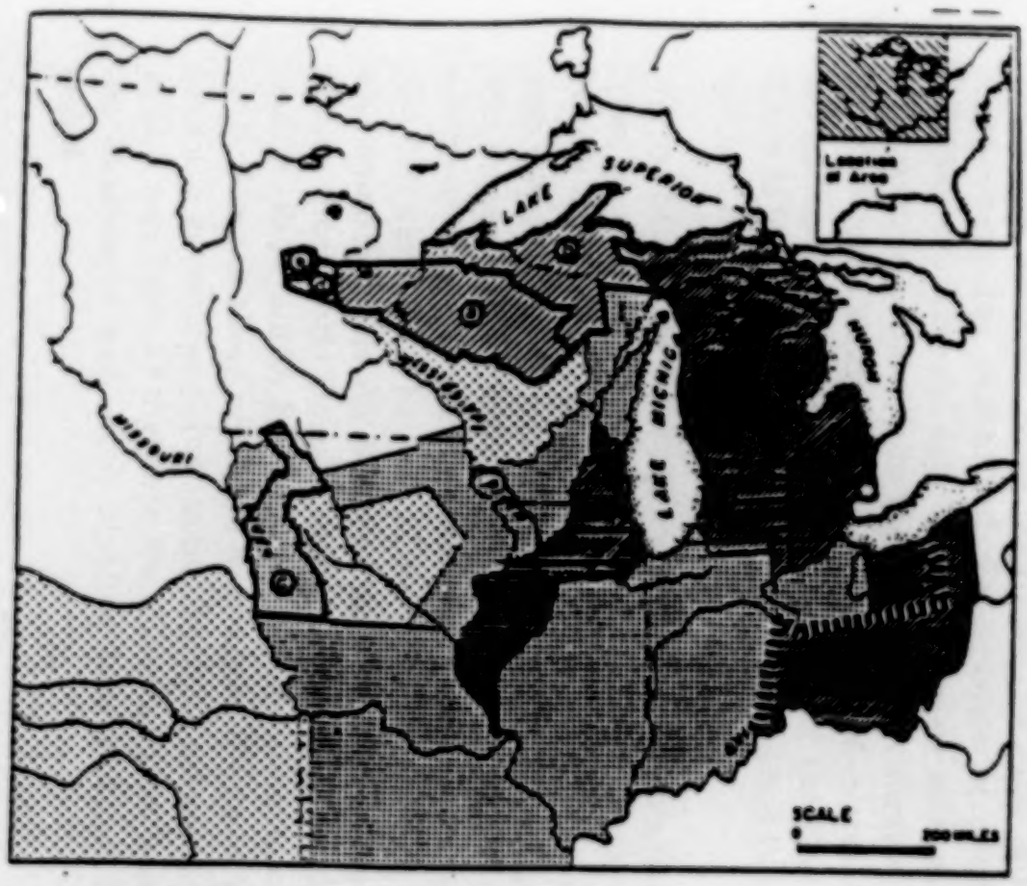

Ojibway Cessions Pre-1837

Non-Ojibway Cessions Pre-1837

Non-Ojibway Cessions 1837-1848

Ojibway Cessions 1837-1848

a. Jul. 29, 1837 (7 Stat., 536) Cession
b. Oct. 4, 1842 (7 Stat., 591) Cession
c. Jun. 5, 1846 (9 Stat., 853) Cession.
d Aug. 2, 1847 (9 Stat., 904) Cession
e. Aug. 21 1847 (9 Stat., 908) Cession

Figure 4. Ojibwe land cessions to 1848 (Peirce, 1990).

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session a considerable number of Wisconsin's statutes were reprinted as Minnesota territorial statutes. Importantly, the assembly made provisions for local units of government and authorized the registers of deeds of Washington, Ramsey, and Benton counties to copy the land records pertaining to their respective counties from the St. Croix County records which had, of course, been moved from Stillwater which was west of the River St. Croix to St.Croix Falls, east of the St. Croix, when Wisconsin had become a state.

In 1849 Minnesota Territory was little more than a wilderness, in which some 1,000 non-Indians lived. In the first census 4,680 were counted, 317 connected with the army and many others of mixed blood. Various trading posts and missions, often associated with Indian villages, were scattered throughout and provided the voting stations for the first elections. The bulk of the population lived in a few small hamlets on the east side of the Mississippi, among them, Point Douglas at the mouth of the St. Croix and St. Paul, which became incorporated as a town in 1849. Some of these residents had acquired title to their land at a government land auction held the previous year at St. Croix Falls At that time the entire territory west of the Mississippi and north of Mille Lacs had not been ceded.

* * *

lines. These individuals controlled the progress of the public land survey throughout the Old Northwest Territory, progress that makes sense only when placed in the context of government, land ownership, and the practice of surveying, all geared towards quickly surveying large

areas that the United States legally owned and for which there was a demand and hence a ready market.

The rectangular survey net did not spread continuously and contiguously. Like a viscous fluid, it spread in different directions at different speeds, favoring certain areas and avoiding others. It was a bottleneck in the entire land alienation process. How fast tracts of land were located and real property boundaries established and how fast the field notes were transcribed and the plats drawn determined the speed with which land could be offered for sale. How fast the land was offered in turn influenced the migration of individuals, many of whom acquired land at the public auction, settled, and demanded government.

There were several reasons that the survey could not spread continuously or contiguously. In the first instance, the federal government acquired title, all of the rights of Anglo-American land ownership, to occupy, use, and even to exclude, from American Indians in a series of treaties according to political exigencies fuelled in part by the demands of individuals already squatting illegally on or adjacent to the unceded lands. Often in such treaties, Congress reserved areas for aboriginal use that were not initially surveyed. Secondly, Congress authorized the survey of lands for which there was a ready market, usually in those areas that were relatively well known. The survey tended to spread continuously, contiguously, and quickly in those areas. Conversely, it spread discontinuously, in a non-contiguous manner, and slowly in areas that were less well known and in which there was little demand for land. It also spread slowly in those parts of the country in which there were extensive land claims made under Spanish, French, and British jurisdiction that

needed to be adjudicated before survey. Thirdly, the progress of the survey was affected by the numerous and interrelated changes that occurred in surveying practice. Some of these were necessitated by what was known about the country authorized to be surveyed, some by changes in the land statutes, some by the increasing sophistication of surveying equipment and surveying field methods.

Ultimately the progress of the surveys depended on the availibility [sic] of funds to create contracts between the federal government and the individual deputy surveyor who laid the rectangular net on the ground. Congress appropriated money to survey particular areas based on the requests and recommendations made by the surveyors themselves. These requests reflected, on one hand which lands that were available to be surveyed, having been ceded, were in greatest demand, and on the other, the practice of surveying under the existing land laws.

Treaties between the federal government and Indians extinguished the aboriginal rights of occupancy and use. Congress responded to the demands for the title to land from the newly created states, from residents and prospective residents, and from corporations, by authorizing and funding the extension of the survey. And so, the effective colonization of the United States, involving the spread of government, land ownership, and settlement, ultimately rested on the course, progress, and detail of the public land survey. "The security of title emanating under this system greatly contributed to the rapid settlement of the public lands" (Annual Report, Secretary of Interior, 1849 19).

The importance of the spread of the public land survey does not merely rest on the fact that it divided land for ownership and jurisdictional purposes. The surveyor, "with the fur traders, the miners, and the early settlers, . . . formed the vanguards of a civilization" (Agnew, 1941, 369). In many instances the surveyor was the first white person to see a particular area, certainly he was the first to assess the nature of the land. His factual record provided states, corporations, and individuals with information needed to make choices about where to acquire land. "For over 100 years the public land surveyors were the most important single source of information on newly opened lands" (Pattison, 1956 6). Anyone who wanted to acquire land used the field notes and the plats made by the deputy surveyor. Even the federal government relied on the information provided by the surveyors to draw maps of newly explored territory (United States, War Department, 1855). Finally much of the legislation enacted by Congress was based upon the reports from the deputy surveyors and the surveyors general (Figure 10).

By 1847, the public land survey had spread to the St. Croix River. Until 1852 the surveys in what became Minnesota Territory were restricted to the area between the St. Croix and Mississippi rivers, the only lands that had been ceded at that time (Figure 11). These were the surveys that allowed those individuals forcibly removed from the vicinity of Fort Snelling in 1839, when the boundaries of the military reservation were drawn, to acquire title to the land on which they were squatting, the

same land that was included in the plat of St Paul just before the arrival of the public land surveyors. These surveys were also the surveys that defined the course of the Mississippi River. These surveys were among the last in the nation to be carried out under the auspices of independently minded Surveyors General, each with "his own individual concept of

* * *

> its steamboat pier, claiming by breaking spring ice. Cabins stood empty, inhabited only infrequently local Indians, prospectors, loggers, and other North Shopre [sic] transients. The buildings were reortedly [sic] razed by fires which frequently swept the forest in the wake of timber barons who cut the rich pine harvest across northen [sic] Minnesota, Wisconsin, and Michigan.
>
> By whatever means, nature quickly reclaimed all traces of Land Office Buchanan. The process was so fast and so complete that for the past half century state and local historians have disputed the townsite's location, appearance, and indeed, argued about whether Buchanan existed at all (Sandvik, 1991 287)

Not surprisingly then, the movement of the office was reason for considerable public concern and argument. Often the closing and opening was left to the discretion of the land officers. In 1861 for example, the register and receiver for the Root River land district were given authority to determine "the precise timing of closing the office at Chatfield, preparatory to its removal, and of its opening for business in Winnebago City" (Proclamation 680).

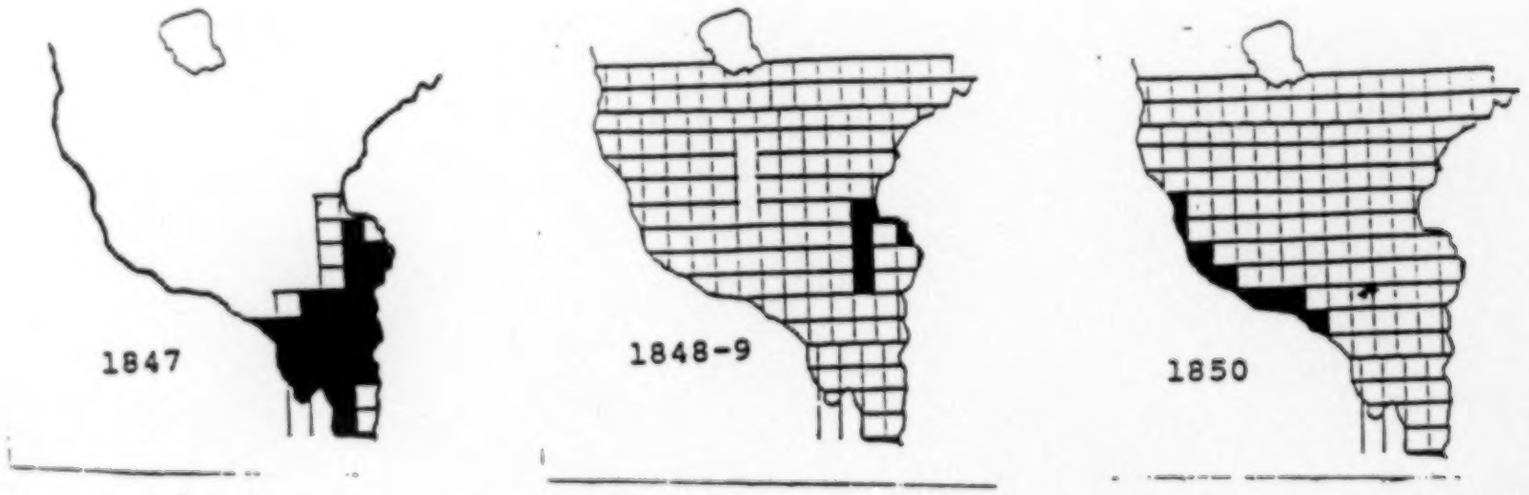
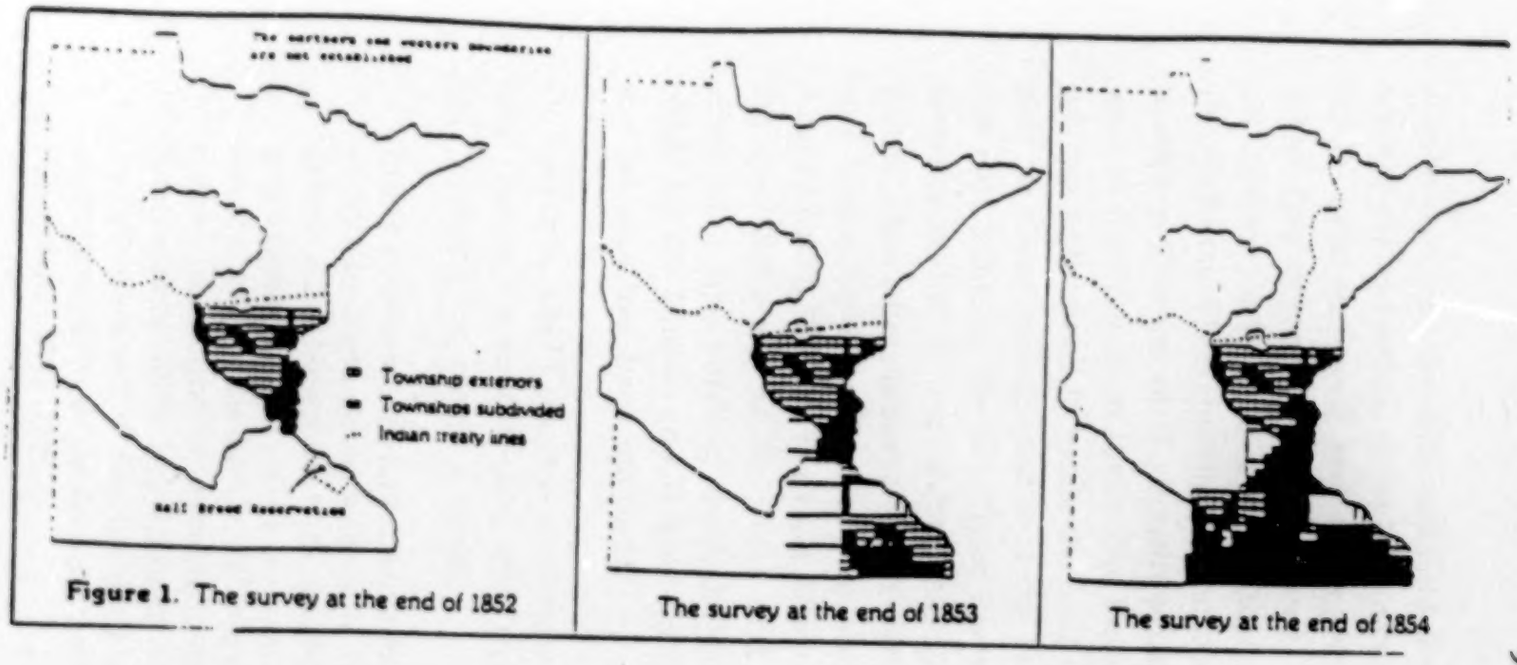


Figure 11. Minnesota public domain survey, 1847-1852.



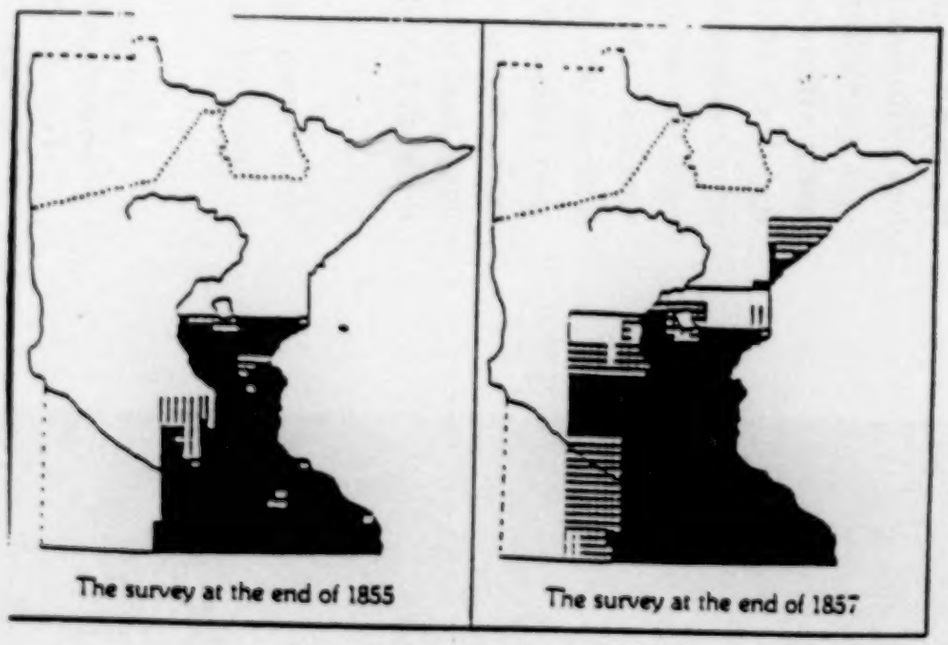


Figure 12. Minnesota public domain survey, 1853-1857.

Changes in land districts and land district office location were made as needed, when Indian cessions occurred and lands were surveyed and when the demand for land ownership intensified and spread. In 1847 Congress established the Chippewa Land District in Wisconsin Territory (9 Stat. 179). This district included all land north of township 22 west of the fourth principal meridian and west of the Wisconsin River. The President, Zachary Taylor, was authorized to locate the land district office wherever he chose and opened it at the Falls of St. Croix, on the east bank of the St. Croix River. Subsequently he announced that 27 townships (436,736 acres) in this land district, including lands situated between the St. Croix and Mississippi rivers, would be sold at public auction August 14-25, 1848 at the land office. At that time only the area between the St. Croix and Mississippi rivers south of a line running through Mille Lacs had been ceded by the Ojibwe and Dakota occupants and an even smaller area had been surveyed.

On March 3, 1849 Congress established Minnesota Territory. During the next decade, until the financial panic of 1857 brought the era to a close,

> (n)ew communities and townsites sprang up in every direction, newspapers and business enterprises were launched with reckless speed, and government activities expanded tremendously. . . . The horde of immigrants to the region, as might be expected, bombarded the land offices with applications for farms and quickly strained to the breaking point the federal machinery set up to cope with the problem (Chatelain, 1941 228).

Before the new Territory was established some land administrative changes were needed, however. A few days earlier, on February 27, President Taylor had proclaimed a second public auction for the Falls of St. Croix land office in Wisconsin. This proclamation included lands to the east of the St. Croix, in Wisconsin, and to the west of the St. Croix, in what became Minnesota. Because of the new Territory, the Chippewa Land District was divided into two and a new Chippewa Land District created, to include only those lands west of St. Croix River (9 Stat 351). Congress located the district office at Stillwater on the western bank of the river (Figure 13). Because these administrative changes were not to become effective until June of the following year, 1850, the auction that President Taylor proclaimed for June 1849 was delayed.

In 1852 Congress created a second land district in Minnesota Territory, the Sauk Rapids Land District (10 Stat. 40). The district included only a small amount of land that had been surveyed and land that had not yet been ceded (Figure 14). The land district office was to, "be located at such a point as the President may direct, and shall be removed from time to time, to other points within said district, whenever in his opinion it may be expedient" (10 Stat. 40 section 1). The land office was located at Sauk Rapids on the east bank of the Mississippi and opened November 1852.

In 1854 Congress created four more land districts west of the Mississippi to include the area ceded by the Dakota in 1851, the Root River district, the Winona district, the Red Wing land district, and the Minneapolis land district (10 Stat. 274). The President was given his usual authority to

to locate the land district office and to appoint the land officers. All of the lands in the Territory not included in any of the newly created districts were attached to the Sauk River Land District. The Commisioner [sic] of the General Land

* * *

having a claim on a tract of land by virtue of occupancy came to have a quasi-legal status. In some parts of the country, particularly in the mining areas of the West but also in parts of Wisconsin, they were protected by a claims association, a group of claimants whose sole aim was to protect the "titles" of its members. These claim associations often established rules to solidify their members' "rights" to the land, by requiring some form of land use for example.

In 1841 claimants were given considerably more rights. Congress enacted a Preemption Act giving individuals preemption rights that guaranteed an individual claiming a "title" to land through occupancy and use could apply to acquire title to the land before anyone else could apply (5 Stat. 453). Such rights only attached to lands that had already been surveyed and could only be exercised by a preemptor declaring a right to such land and by fulfilling the provisions of the land laws of the time, attending the public auction, filing the necessary papers at the necessary land district office and paying the requesite [sic] fees.

Individuals continued to occupy and use land in advance of the survey, even in advance of Indian cessions. Not surprisingly, since Congress had enacted a Preemption Act, such individuals were confident that when the land

was ceded and surveyed they would be entitled to acquire title as preemptors. Under such expectations individuals made, notarized, and recorded quit claim deeds and mortgages to land in St. Croix County, west of the St. Croix for several years before the public domain survey commenced, in 1847. At the first few land sales in Minnesota Territory preemptors, who were ordered to identify themselves before the public auction that affected their tract of land, paid cash for their land or used scrip or warrants of one type or another to acquire title to the land they occupied.

In 1854 Congress authorized preemptions on unsurveyed land in Minnesota, in essence exposing all of the ceded area in Minnesota Territory to legal settlement, meaning agricultural settlement, by anyone (10 Stat. 576).

Separate from the squatters on agricultural land, who received special treatment from Congress, were the squatters in the woodland areas. As the demand for contruction [sic] timber grew the pinelands of northwestern Wisconsin and subsequently eastern Minnesota Territory became part of a huge speculative enterprise.

> The race for logs, mill sites, and profits had begun. Much of this frenzied economic activity took place on land that still belonged to the federal government (Rohrbough, 1978 339).

Lumber firms located their businesses on streams, constructing whatever facilities they needed and proceeded to cut trees in the vicinity. In most instances such firms had no legal rights to the land. Even after 1841, most of the timberlands in northwestern Wisconsin, including the area west of the St. Croix River, was unsurveyed. In

addition, the lumber firms could not satisfy the occupancy and use requirements of the Preemption Act which was designed to cater to individual farmers. But of course the lumber companies did not wish to acquire title to land but merely to cut the timber. There was no legal mechanism for them to acquire what we now know as stumpage, the right to cut timber in a certain area, so they operated illegally. In some instances they entered into agreements with the Indians. In 1838 an illegal agreement was made between Dousman and several Ojibwe and Dakota prompted mills at St. Croix Falls, Marine, Point Douglas, Lakeland, and Osceola (Goodwin, 1922 265). Clearly Congress knew all about such activities. Throughout the annual reports of the Surveyor General of Wisconsin and Iowa are recommendations to survey pinelands and sell them to prevent the illegal timber harvesting (see Appendix I).

Land Statutes and the State

To induce individuals to move westwards and to acquire land, the federal government recognized the need to promote government to ensure secure title and an orderly society. As has already been discussed, this was achieved by dividing

* * *

instances the state applied for title, by means of a selection list, at the particular land district office. At these offices the state was competing with private individuals for title to specific tracts of land.

Congress fully intended that Minnesota, like other states that had joined the Union before 1858, would sell the land to individuals and corporations in order to raise the revenue necessary to carry out the public purpose expressed in the grant. There was no intent that the lands would remain owned by the state in part because there was a national consensus to privatize all land. The public domain land that the federal government had withdrawn (reserved) from sale earlier, such as the timber areas of the south for naval supplies or the lead mines of Illinois and Wisconsin, had been withdrawn temporarily and were eventually conveyed to others.

The state clearly intended to sell the lands that it selected under the provisions of various federal land grant statutes to raise revenue for the state government and to add to the revenue base of the local units of government through a real property tax imposed on privately owned land in Minnesota. In Article XI Section 8 of the Minnesota Constitution is a provision to ensure that the proceeds from their sale should be placed into a permanent fund.

The state has acquired title to land under the terms of the various land statutes, most of which have no definite use objective, throughout the nineteenth and twentieth centuries. It has also sold such title throughout the same period.

A large amount of land was acquired from the federal government during the last two decades of the nineteenth century, however, when the public domain survey had spread to the northern part of the state, to lands for which there was little demand from private individuals,

and when the legislature, mirroring decisions made by the federal government, decided to retain some of the lands that it owned. The idea that government should retain ownership of some lands was not new in the United States. The federal government had already withdrawn Yosemite from the possibility of sale and transferred jurisdiction over it to the state of Cailornia [sic] and had withdrawn an area in Montana and Wyoming and established Yellowstone national park, the first of the nation's parks. As Dana et al (1960 112) noted,

> Creation of Yellowstone National Park in 1872 marked the first step in the evolution of natitonal [sic] policy from that of virtually complete disposal of the public domain to that of virtually complete reservation. . . . The evolution from disposal to reservation culminated in 1935, when President Roosevelt withdrew from entry, pending classification, practically all of the remaining unreserved and unappropriated public domain.

But these were isolated examples of public ownership, very different from the public ownership that was initiated in 1891, when Congress gave the President authority to withdraw forested areas in the West (26 Stat. 1095). The institutionalizaton [sic] of reserving land came about partly as the result of a concerted effort by various people (Petulla, 1977, 217 ff) and partly as a result of the recomendations [sic] of the first Public Land Law Review Commission established in 1879 to review the operation of the land statutes. In the same year, 1891, the Minnesota legislature established Itasca State Park which initiated a similar land reservation process in Minnesota (Minnesota Laws, 1891 ch. 56). This established the principle that

some land was useful for a public purpose, a purpose that could only be achieved through public ownership. Such land would be withdrawn from sale and would remain owned by the public.

Land Statutes and Railroad Corporations

To induce individuals to move westwards and acquire land the federal government recognized the need to promote transportation. Without access to markets for their goods, access that could only be provided by transportation, individuals would not acquire land. Without settlers already in place the transportation companies, particularly the railroad companies, would not provide such a service.

The federal government thus was forced to subsidize the construction of numerous railroad lines throughout the nation by granting alternate sections of land along the line within certain limits distance. In the area ceded in 1837, the Lake Superior and Mississippi Railroad Company acquired a substantial amount of land (Figure 20). Under the terms of Congressional legislation enacted March 3, 1857 (11 Stat. 195), which replaced an earlier grant that had been rescinded August 4, 1854 (10 Stat. 575) the company acquired title to alternate sections along the right of way of a railroad line from St. Paul to the head of Lake Superior as they built the line. The company sold these lands to individuals in order to finance their continued operations.

Summary

The process af [sic] land alienation, necessarily involving government in a number of ways, was not unique in Minnesota nor did it produce a unique pattern of land ownership. Apart from the isolated squatter, who was given increasing legal recognition, and those concerned with lumber trade, non-Indians migrated westwards into the area that was ceded in 1837 only after the federal government extended the authority and force of federal law over it. When Congress created Wisconsin Territory and Minnesota Territory, one necessity for land ownership and settlement, security to persons and real property, was established. When Congress authorized the extension of the public land survey west of the St. Croix River survey, which imposed the imaginary lines that determined the first real property boundaries, a second necessity was established. When Congress offered the lands that had been ceded and surveyed for sale at public auction, a third necessity was established. Individuals, corporations, and eventually the state of Minnesota acquired title to land parcels in the ceded area and the chain of title was started. The title, initiated with a patent by which individuals and corporations acquired land from the federal government, or an approved list by which the state acquired land, was not "subject to" restrictions, covenants, or easements. They were certainly not "subject to" the privileges of the American Indian occupants from whom the titles were acquired. All subsequent titles in the chain were similarly free from encumbrances save for those created by the owners and the government. The modern title is also free from such restrictions.

In giving the Minnesota Territorial government power to control land ownership the federal government did not insist that the temporary privileges granted in the 1837 treaty be included as part of the public record. They might have done so, in fact they surely would have done so, to safeguard such privileges and these privileges would be similar to the modern zoning restrictions that restrict the rights of all land owners in a particular jurisdiction.

The entire public record, on which all land titles rest, is silent on the question of American Indian privileges. The reason must be that the privileges did not exist upon those lands that were conveyed by the federal government to individuals, the railroad company and the state of Minnesota. The land alienation process was predicated on the fact that when Indian ceded land that land was subject to survey and sale. When the land was surveyed and conveyed there were no restrictions on the rights of the owners except those imposed by the territorial governments. Those concerned with conveying federal land titles, the surveyors and the officials of the General Land Office both in Washington and in the various land offices in Minnesota, make no mention of such privileges. Finally, nowhere in the literature concerning the land alienation process has any scholar intimated that temporary privileges granted to American Indians would continue to exist after ownership of land had passed from the federal government.

Public Lands in Minnesota

In the language of several thousand land statutes, reflecting very disparate goals, Congress authorized the General Land Office to convey title to individuals, corporations, and states. The principal objectives of the statutes and these conveyances was to subsidize the settlement of the continent on what was generally regarded as land that was valuable for agricultural purposes. There are several aspects of such subsidies, each possessing a geography and history. Selling tracts of the public domain to individuals in order to raise revenue, donating land to reward military services and to encourage residence and tree planting is one. Donating public domain lands to railroad companies either directly or through an intermediary, such as a state legislature, to encourage the construction of transportation lines into uninhabitated [sic] areas is another. Giving states the right to acquire title to the public domain as they entered the Union, and subsequently, is a third. Somewhat paradoxically, the federal government, states, railroad corporations, and many individuals were competing with one other to sell tracts to those who wished to settle on the land.

Until 1891 there was no national consensus, although there was clearly some public sentiment, that the federal government should retain title to any land. In 1891 Congress authorized the President of the United States to set aside forest reserves in order to protect some timber areas from private exploitation (26 Stat. 1095). This legislation initiated the idea of public land in the United States. Until that time the obvious intent of the federal government had been to privatize land throughout the United States.

The public use of the natural resource lands of Minnesota began at the end of the century when Congress and the state legislature accepted both outdoor recreation and forest protection as a responsibility of government, saw public ownership of land as desirable, and established national forests, state parks and state forest reserves. Until that time, throughout the nineteenth century, the lands owned by the federal government and the lands that the state acquired from the federal government under the provisions of the federal land grant statutes were conveyed as quickly as possible to raise revenue (Figure 21). Although the state leased lands that produced hay (Minnesota Laws, 1858 ch. 17) and sold stumpage rights (Minnesota Laws, 1877 ch. 56), state owned lands were only to be retained and used for administrative purposes such as buildings, educational, transportation, and governmental facilities. The only lands acquired during the nineteenth century and not sold were those lands for which there was not a ready market, those that could not produce goods and services that were in demand and hence were not considered valuable by the private landowner, lands that had little agricultural value, mainly located in the northern part of the state.

During the twentieth century, as the demands for government goods and services have increased, both state and federal governments have reserved the land already publicly owned and have acquired land in various ways for various purposes, lands that they had previously conveyed to others. Most of the lands in the state currently owned by the public, some form of government, have been acquired, in most instances from individuals.

Very little of the land owned by the federal government comprises land has always been in federal ownership, the public domain lands. Such land was still owned when the idea of reservation was inititiated [sic] in Minnesota, when the Minnesota, now the Chippewa, and the Superior national forests were established.

Approximately one third of the lands currently owned by the state have always been in state ownership (Figure 22). These are lands that were acquired from the federal government, principally under the terms of the land statutes enacted in the nineteenth century. Most of these lands are located outside the 1837 cession area.

With the exception of a few tracts that have always been owned by Indians and a few scattered tracts of trust land, the public lands in the ceded area, lands to which title is vested in the federal and state governments, are lands that have been acquired by the governments, either voluntarily or involuntarily, from private legal entities since 1891.

In the case of the federal government lands have been acquired directly or indirectly from individuals with the consent of the state to such acquisition. All of the state-owned lands have also been so acquired with the exception lands that the state selected to satisfy the land grant statutes, th [sic] trust lands (Figure 23). Title has been acquired over a century or more in different ways. Some were acquired to fulfill a valid public purpose, outdoor recreation and wildlife habitat, for example. Others were acquired to provide fiscal relief for the respective counties through the state's tax forefeiture [sic] statutes. The state continues to acquire and dispose of tracts of land.

The current ownership status of a parcel of land is a product of history and the current public lands are best seen as an outcome of a longstanding debate in Minnesota about how best to use land to produce needed goods and services, either through private land use or public land use.

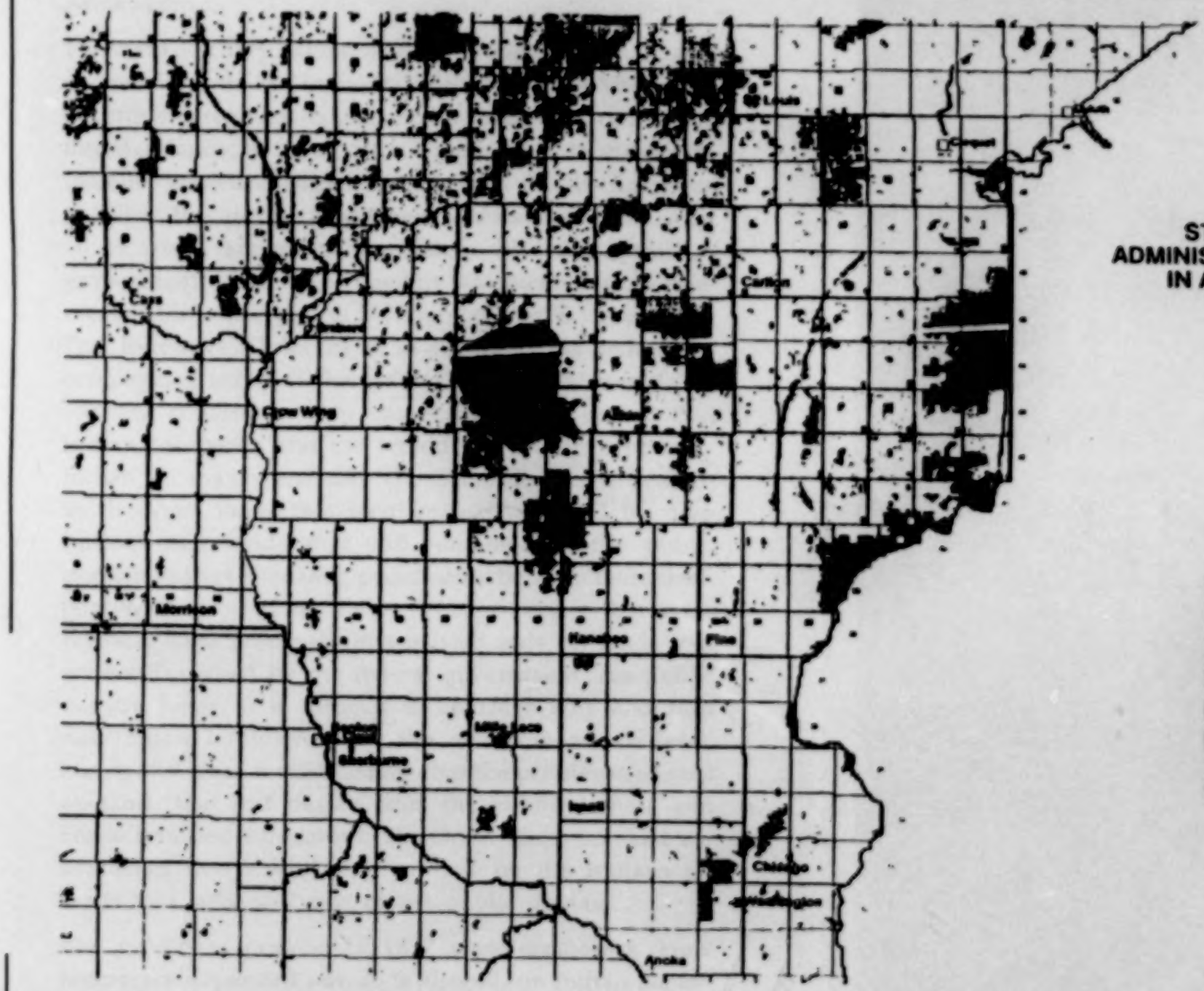
If the privileges of hunting, fishing, and gathering wild rice granted to the Mille Lacs Band of the Chippewa in the treaty of 1837 exist today they must extend over all lands

* * *

actions by the state legislature regarding land acquisition in the ceded area. The state would be unwilling to acquire title in these counties because such land would become subject to the exercise of the 1837 privileges, privileges that other Minnesota residents, non-Indians, cannot enjoy.

If the privileges exist they must nullify, or at least supersede, some, if not all, of the restrictions that successive territorial and state legislatures have imposed on the use of private land in the ceded area. They must also nullify or supersede the powers to control the use of private land that the legislatures have delegated to counties and municipalities.

Finally to argue that the privileges extend over all public watercourses invites debate since the courts have long held that the state's public trust obligations in such waters must be active and cannot be removed (see Appendix IV).



STATE-OWNED LANDS ADMINISTERED BY DNR & COUNTY IN AREA OF 1837 TREATY

BY LAND TYPE

SEPTEMBER, 1992

LAND TYPE

- Trust
- Acquired
- Acquisions In Progress
- Consolidated Conservation
- Tax Forfeited
- Volstead

Lakes

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Addendum

President Zachary Taylor, or most probably his staff, was aware of events in Minnesota. He established Minnesota Territory, extending its jurisdiction over both ceded and unceded lands; he created the Chippewa land district, to include ceded and unceded land, with the district office in Stillwater; and he proclaimed and delayed land sales, all of which are actions consistent with the spread of government and land ownership that fuelled [sic] settlement in the area ceded in 1837 west of the St. Croix River. The Executive Order of 1850 revoking the temporary privileges granted to the Indians in the 1837 treaty was entirely consistent with those actions, ensuring that Indian occupancy and use would not conflict with non-Indian occupancy and use. The Order did not differentiate between lands that were privately owned by non-Indians and lands that still remained in the public domain not yet alienated, presumably because there there [sic] was no need to do so. The privileges that were revoked were privileges that existed only on lands that were still owned by the federal government, the public domain lands. It is difficult to envisage why and how non-Indian landowners or the governments, federal, states, and local, would assume that the privileges existed on lands that had passed from the public domain and hence from federal control. The Order, then, revoked the privileges that were being enjoyed by the Indians on lands that were still part of the public domain.

The privileges granted in 1837 were temporary. How temporary depended not, as is alleged, on Indian behavior, but rather on when the ceded lands were demanded by non-Indians. The public land (domain) survey, the first

step in the title conveyance process, progressed according to these demands, from those already in the area and those wanting to move there, from settlers wanting to practice agriculture and those who wanted access to timber. The Surveyor General of Wisconsin and Iowa constantly argued that survey and then sale was the best way to protect timber in the ceded area. Consistent with the spread of government and non-Indian land ownership, followed by the spread of settlement and other economic activities, the privileges were revoked in 1850. Apparently, the short period of time between when the land was ceded and when the privileges were revoked surprised everyone. However, the Indian privileges of hunting, fishing, and gathering that was part of Indian ownership were clearly regarded as inconsistent with non-Indian ownership characterized by more sedentary land use practices.

The treaties of 1854 and 1855 served to expose lands north of the area ceded in 1837, to the land alienation process. Both treaties contain language slightly different from each other and from the 1837 treaty. But the intent was the same, to remove the rights of occupancy and use of particular groups of Indians, rights often referred to as Indian ownership, from a particular area. As part of the compensation for the lands site specific reservations of land were given for bands of Indians and thus the 1855 treaty contains explicit language in which the,

> the said Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever

> the same may be, which they may have in, and to any other lands in the Territory of Minnesota
>
> (Article I, 10 Stat. 1165).

Such language is entirely consistent with the spread of the land alienation process to these areas. Federal Indian policy had changed, from removal to isolation on reservations. This created a problem unless the boundaries of the reservation were precisely defined and all of the Indian rights of occupancy and use, ownership, eliminated from the ceded area outside those reservation [sic] in order to allow survey and title conveyance.

The privileges were temporary and so have never have been part of the public record with which virtually all problems of title are solved and without which there can be no warranties in any conveyances. The public record is entirely silent about the alleged privileges.

If, as alleged, these privileges were not revoked in 1850 the federal government had the obligation to give jurisdiction to Wisconsin and Minnesota territorial legislatures in the ceded area by statutes containing an exception regarding the privileges retained by the Indians. This they did not do. Congress made specific mention of Indian ownership in the Organic Act of 1836 establishing Wisconsin Territory. No words reveal an intention that Indian privileges of hunting, fishing, and gathering could and might attach to the title of non-Indian land ownership. Thus, both Wisconsin and Minnesota territories and, later, both states received complete jurisdiction over non-Indian lands, much as other territories and states had received previous to this time.

If the privileges existed at the time the federal government conveyed title to non-Indians, it had an obligation to convey title to real property within the ceded area with a patent listing the privileges as an exception to the owner's quiet enjoyment and use. The original owners of such real properties could expect no less. Successive owners possessed the same obligations and expectations.

* * *

Expert Report Of Alan S. Newell (Excerpts)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Mille Lacs Band of Chippewa Indians, Arthur Gahbow, Walter Sutton, Carleen Benjamin, and Joseph Dunkley, Plaintiffs	)	Civil No. 4-90-605 EXPERT REPORT OF ALAN S. NEWELL RE: HISTORICAL CIRCUMSTANCES SURROUNDING 1837 AND 1855 TREATIES WITH THE CHIPPEWA
United States of America, Plaintiff-Intervenor,	)	
vs.	)	
State of Minnesota, Minnesota Department of Natural Resources, and Rod Sando, Commissioner of Natural Resources, Defendants,	)	
County of Aitken, et al. Defendant-Intervenors	)	
John W. Thompson, et al. Defendant-Intervenors,	)	
and Save the Mille Lacs Association, *Amicus Curiae.*	)	

Submitted by: /s/ Alan S. Newell
Alan S. Newell

Revised: May 2, 1994

EXPERT WITNESS DISCLOSURE

Alan Newell

I have been employed by the State of Minnesota since June 1992 as a general consultant for this case, and since August 1993 I have been preparing a report on the historical circumstances surrounding the 1837 and 1855 Treaties with the Chippewa. I am paid at the rate of $85.00 per hour. I have testified as an expert witness in six cases listed in my vitae. My background, additional experience, and published work are also described in my vitae.

/s/ Alan S. Newell
Alan S. Newell

April 27, 1994
Date

EXPERT REPORT OF ALAN S. NEWELL
RE: HISTORICAL CIRCUMSTANCES SURROUNDING 1837 AND
1855 TREATIES WITH THE CHIPPEWA

TABLE OF CONTENTS

Section			Page
Section			
1.0	THE TREATY WITH THE CHIPPEWA OF JULY 29, 1837		5
	1.1	The Policy of Removal	9
	1.2	The 1837 Treaty with the Chippewa	12

2.0	MILLE LACS PARTICIPATION IN THE CHIPPEWA TREATY OF 1842		19
3.0	THE FOND DU LAC TREATY OF 1847 AND CHIPPEWA REMOVAL		23
	3.1	The Search for Lands West of the Mississippi River	24
	3.2	The Treaty of 1847	26
	3.3	After the Treaty of Fond du Lac	30
	3.4	The Executive Order of February 6, 1850	32
4.0	THE CHIPPEWA TREATY OF 1855		43
	4.1	A New Indian Policy	44
	4.2	The February 22, 1855 Treaty	50
5.0	RUM RIVER LOGGING AND THE AGREEMENT WITH THE MILLE LACS JUNE, 1855		55
6.0	CONCLUSION		58
7.0	BIBLIOGRAPHY		60
	7.1	Primary Sources	60
	7.2	Secondary Sources	62

LIST OF FIGURES

Figure 1. Chippewa Land Cessions, 1837-1855 13

VITA FOR ALAN S. NEWELL ..... EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
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John W. Thompson, et al. Defendant-Intervenors,	)	
and Save the Mille Lacs Association, *Amicus Curiae.*	)	

I am a Senior Associate Historian in the firm of Historical Research Associates, Inc. [HRA]. I hold a Bachelor and a Master of Arts Degree in American History from the University of Montana. A copy of my vitae is attached to this document as Exhibit A.

Over the past twenty years, my duties at HRA have included researching and writing histories of numerous Indian tribes in the United States. In 1976, I co-authored a history of forestry on the Flathead Indian Reservation in Montana for the Bureau of Indian Affairs and the Confederated Salish and Kootenai Tribes. I subsequently assisted in the preparation of a number of forest histories for Indian reservations in Montana, Wyoming and New Mexico. In 1986, I co-authored a history of national activities for the Bureau of Indian Affairs' Branch of Forestry. This study was subsequently published by the Department of the Interior. Most recently, I directed the preparation of a history of forestry on six Chippewa Indian reservations in Minnesota.

In addition to the research and writing that I have done with respect to Indian resource issues, I have also undertaken a number of other projects involving the history of nineteenth and twentieth-century Indian policy. In 1977, I worked for the Governor's Office in Montana collecting and analyzing archival and legislative documents concerning Indian tribes in that state. Since 1983, I have worked on a variety of historical Indian issues for the United States Department of Justice and/or the Bureau of Indian Affairs relating to the application of federal Indian policy towards Indian tribes in New Mexico, Arizona, Montana, Idaho, and California. In 1992, I undertook a study of federal relations with the Saginaw Chippewa in Michigan during the first half of the twentieth century for the United States Department of Justice.

I have also worked for a number of state agencies researching and writing historical narratives that address specific questions of Indian history and United States

Indian policy. Between 1983 and 1985, and again during the period 1990-1991, I researched the history of various bands of Wisconsin Chippewa during the period 1837-1854 and in the twentieth century for the Office of the Attorney General, State of Wisconsin.

I have testified as an expert historian on American Indian policy in a number of federal and state courts. These include United States District Courts for Montana, Washington and Wisconsin, and state district courts in Montana and New Mexico. I have also testified as an expert historian on other matters relating to the history of the American West in state courts in Montana and Washington.

I am a member of a number of professional historical organizations, including the Organization of American Historians, the Western History Association, and the Forest History Society. In 1992, I was elected to the Board of Directors of the National Council On Public History [NCPH]. The NCPH is a national historical organization composed of professional, academic and non-academic historians. The organization's principal goal is to promote the application of history in the public and private, non-academic sector. I also serve on the advisory board of the Center For the Rocky Mountain West, a non-profit research institute that is affiliated with the University of Montana. One of the Center's goals is to facilitate a broader understanding of the role of Indian history in contemporary western society.

I began working for the State of Minnesota on this case in June, 1992. At that time, I was retained as a consultant to review and organize documents that I had

previously collected pertaining to the Mille Lacs Band of Chippewa during the time period 1837 to 1855. I also agreed to undertake additional research as necessary. My research for this report has involved working with documents addressing federal relations with the Chippewa that I have collected for various reports since 1983. These include records that I reviewed for my work in Wisconsin noted above, as well as documents that my firm used to prepare the history of forestry on Chippewa Reservations in Minnesota. This material includes primary and secondary source documents, as well as an extensive collection of archival records kept by various federal agencies and private organizations. I have also reviewed documents collected by the Minnesota Attorney General's Office and by the plaintiffs in this case. Finally, in preparing this report I have reviewed additional reference material and legislative records concerning the history of federal relations with the Mille Lacs Band of Chippewa during the nineteenth century.

The results of my research of the historical events surrounding the treaties with the Chippewa of July 29, 1837 and February 22, 1855, have led me to conclude that the purpose of the agreements was to extinguish Chippewa interest in lands within what became the states of Wisconsin and Minnesota. The federal policy surrounding the 1837 treaty also envisioned consolidating Chippewa on lands west of the Mississippi River. Since none of the negotiators of the 1837 treaty had a clear understanding of when the ceded lands would be required for non-Indian settlement, they agreed to allow the Chippewa the privilege of hunting, fishing, and gathering on the ceded lands at the discretion of the President.

Subsequent treaties with the Chippewa in 1842 and 1847, Wisconsin statehood in 1848, and the establishment of Minnesota Territory in 1849 presaged an effort to remove Lake Superior Chippewa to lands west of the Mississippi River between 1850 and 1851. This was effected by the issuance of an executive order on February 6, 1850 revoking the hunting and fishing privileges granted in 1837 and instructing Indian officials to consolidate the Chippewa on lands west of the Mississippi. The strenuous opposition of the Lake Superior Chippewa and their trader and missionary allies to this order, coupled with the tragic loss of many Chippewa at Sandy Lake Agency during the winter of 1850-51, effectively ended further efforts to remove the Lake Superior bands. There is no contemporaneous historical evidence, however, that the executive order of February 6, 1850 was rescinded or that the revocation of hunting and fishing privileges did not remain in effect with respect to the Mille Lacs Chippewa.

The Mille Lacs Chippewa lived near the Mississippi River on the northern boundary of the 1837 ceded territory. Given their location, they were not particularly affected by the removal section of the 1850 Presidential order. However, as immigration to Minnesota increased during the 1850s and as lumbermen surveyed and cut timber south of Mille Sacs on the Rum River, it became increasingly apparent to the Mille Lacs that they needed to secure a permanent home in their traditional area. This desire on the part of the Mille Lacs coincided with a change in federal policy during the late 1840s and early 1850s. No longer did the Congress believe that moving Indians farther west behind an "Indian barrier" was possible or even desirable. By 1855, it was federal policy to

identify reserved areas for Indians within their traditional territories. Consequently, the Mille Lacs Chippewa desire to secure a permanent home and the federal government's view that defined reservations would further the progress of Indian "civilization," prompted both parties to reserve lands for the Chippewa on the south shore of Mille Lacs Lake by the treaty of February 22, 1855.

1.0 THE TREATY WITH THE CHIPPEWA OF JULY 29, 1837

The Chippewa, or Ojibwa, was the largest and most important tribe of the Algonquian-speaking Indians in North America when Europeans first visited the Great Lakes. The Tribe inhabited an extensive territory in the region of the Upper Great Lakes, in the present-day states of Michigan, Wisconsin, Minnesota, and in the Canadian provinces of Ontario, and Manitoba. Chippewa were found as far west as the Turtle Mountains in North Dakota.

In the mid-eighteenth century, as white settlement moved west from the Atlantic seaboard, the Chippewa were engaged in on-going warfare with Sioux Indians. Chippewa had pushed Sioux bands westward and established permanent villages south of Lake Michigan. In 1750, the Chippewa defeated Sioux warriors at the battle of Kathio, near Mille Lacs Lake, and in subsequent battles, Chippewa dislodged Sioux from the area east of the Mississippi River above the Falls of St. Anthony.[1] Hostilities between the Chippewa and Sioux continued at the

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[1] Willoughby M. Babcock, Jr., "Sioux Versus Chippewa," *Minnesota History*, Vol. 6 (1925), pp. 41-42; Babcock. Major

beginning of the nineteenth century prompting the United States government to establish a military post and later an Indian agency near the confluence of the Mississippi and Minnesota (then, St. Peter's) Rivers. Lawrence Taliaferro was appointed agent for Sioux and Chippewa Tribes at the new agency in 1820.

As early as 1795, the United States had entered into treaties with Chippewa and other tribes to acquire vast amounts of lands north and east of Lake Michigan.[2] During the mid-1820s, after these early land cessions, the federal government entered into three treaties with Chippewa and other tribes, including the Chippewa's Sioux enemies, for the purpose of establishing peace among the tribes. These treaties demarcated the participating tribes' respective territories, designating 27 million acres of land

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Lawrence Taliaferro, Indian Agent, *Mississippi Valley Historical Review*, Vol. XI, (December, 1924), p. 367. Edmund Jefferson Danzinger, Jr., *The Chippewas of Lake Superior*, (Norman: University of Oklahoma Press, 1979), pp. 36-38; Roy W. Meyer, *History of the Santee Sioux: United States Indian Policy on Trial*, (Lincoln: University of Nebraska Press, 1967), pp. 13-14.

[2] Treaty of August 3, 1795, 7 *Stat.*, 49, Charles I. Kappler, *Indian Affairs, Laws and Treaties*, Vol. 2 (Washington: Government Printing Office, 1904), pp. 39-45. See also, Treaty of July 4, 1805. 7 *Stat.*, 887, Kappler II, pp. 77-78; Treaty of November 17, 1807, 7 *Stat.*, 105, Kappler II, pp. 92-95; Treaty of November 25, 1808, 7 *Stat.*, 112, Kappler II, pp. 99-100; Treaty of August 24, 1816, 7 *Stat.*, 146, Kappler II, pp. 132-133; Treaty of September 29, 1817, 7 *Stat.*, 160, Kappler II, pp. 145-151, and supplement treaty of September 17, 1818, 7 *Stat.*, 178, Kappler II, pp. 162-164; Treaty of September 24, 1819, 7 *Stat.*, 203, Kappler II pp. 185-187; Treaty of June 16, 1820, 7 *Stat.*, 206, Kappler II, pp. 187-188; Treaty of July 6, 1820, 7 *Stat.* 207, Kappler II, pp. 188-189; Treaty of August 29, 1821, 7 *Stat.*, 218, Kappler II, pp. 198-201.

as Chippewa territory in Wisconsin, upper Michigan, and Minnesota.[3] The Office of Indian Affairs ordered Taliaferro to prohibit Chippewa from entering his agency, and the Tribe was placed under the jurisdiction of Henry Schoolcraft, at an agency in Sault St. Marie at the eastern end of Lake Superior. Taliaferro continued as agent to the Sioux.[4] Despite the peace treaties and the segregated territories, and despite the order to Taliaferro, Chippewa persisted in visiting their former agent and hunting in Sioux country, and battles between the two tribes continued.

The extension of navigation to the Upper Mississippi River Country in 1826 focused interest on the pine resources of the region, eventually prompting the United States to seek a cession of valuable pine land from the Chippewa in 1837. Logging operations in Chippewa country date from as early as 1822 when Harden Perkins built illegal sawmills on the Black and Chippewa Rivers. Also, the federal government cut pine on the Rum River and cut lumber for construction needs at Fort Snelling in 1822. Additional early attempts at lumbering activities on

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[3] Treaty at Prairie du Chien, August 19, 1825, 7 *Stat.*, 272, Kappler II, pp. 250-255; Treaty of August 5, 1826, 7 *Stat.*, 290, Kappler II, pp. 268-273; Treaty of August 11, 1827, 7 *Stat.*, 303, Kappler II, pp. 281-283. About 15 million acres of the Chippewa territory was in Wisconsin, 7 million in Minnesota, and 5 million in Michigan's upper peninsula.

[4] Lawrence Taliaferro to Gen. William Clark, March 15, 1828, *Taliaferro Papers*, Microfilm copy, Roll 2, Minnesota Historical Society (MHS), St. Paul, Minnesota.

the Chippewa River occurred in 1828 and 1829.[5] The arrival of the first steamboat at Fort Snelling in 1823 can be seen as a companion development to these incipient logging businesses. By 1836, five steamboats had arrived at the fort between May and October.[6]

Wisconsin became a United States territory in 1836, and, at the beginning of the next year, the territorial governor was urging government purchase of all Chippewa and Sioux pine lands east of the Mississippi River.[7] By that time, whites were cutting large volumes of timber

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[5] Babcock, "Major Lawrence Taliaferro, Indian Agent," p. 372. Although the logging operations were illegal, Babcock notes the frontier's increasing needs for lumber. For discussion of government logging on *the* Rum River see Thomas F. Waters, *Streams and Rivers of Minnesota*, (Minneapolis: University of Minnesota Press, 1977), p. 178. Most early white pressure to log seems to have been along the Chippewa River. See Taliaferro to Boilvin, July 30, 1823; Taliaferro to Campbell, February 13, 1828; Taliaferro to Clark, February 10, 1828. All in *Taliaferro Papers*, Roll 2, MHS, St. Paul, Minnesota.

[6] Captain Russell Blakeley, "History of the Discovery of the Mississippi River and the Advent of Commerce in Minnesota," *Collections of the Minnesota Historical Society*, Vol. 8 (1898), p. 376. Blakeley documents the numbers of steamboats arriving at Fort Snelling annually from 1823 to 1839. Blakeley also discusses the development of steamboat transportation in the Minnesota territorial and early statehood period, up to 1862. The settlement pattern in Minnesota is reflected in the following statistics pertaining to steamboat arrivals: between 1844 and 1862, the annual numbers of arrivals increased from 41 to 846. The peak year, however, was 1858, when St. Paul newspapers reported 1090 steamboat arrivals. See Blakeley, p. 413.

[7] C. A. Harris, Commissioner of Indian Affairs [CIA] to Interim Secretary of War B. F. Butler, January 9, 1837, *House Document 82*, 24th Congress, 2d Session, Serial 303, pp. 2-3.

in the Mississippi River drainage, particularly along the St. Croix and Chippewa Rivers.[8] Mississippi Bands of Chippewa in 1836 wanted a mill and lumber operations established on the Chippewa River for their own benefit and for the benefit of non-Indians who purported to be their friends.[9] By 1837, Indians from the Chippewa River

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[8] In 1832, non-Indians were also taking logs from along the Rum River. Taliaferro Journal entry, May 22, 1832, *Talinferro Papers*, Roll 3, MHS, St. Paul, Minnesota. By early 1834, white lumbermen were seeking to log timber along the Snake and St. Croix Rivers. Henry Schoolcraft, Indian Agent, to Lyman M. Warren, March 4, 1834, Records of the Michigan Superintendency, 1814-1851, Letters Sent by the Agent at Mackinac, May 31, 1833-July 1, 1836, M1, Roll 69, Records of the Bureau of Indian Affairs, Record Group (RG) 75, National Archives – Washington, D.C. (NA); Lucius Lyon, to Lewis Cass, Secretary of War, September 14, 1834, with enclosures, Letters Received by the Office of Indian Affairs (LR), La Pointe Agency, 1831-1839, M234, Roll 387, RG 75, NA.

[9] Pressure to cut timber and establish a sawmill along the Chippewa River was intense in 1836, when Hercules Dousman convinced Chippewa Indians to support his application to erect a mill along the river. Chippewa Chiefs to President of the United States. May 10, 1836, (written by Dousman, the applicant); S. C. Stambaugh to Lewis Cass. September 6, 1836; Stambaugh to CIA and Secretary of War, October 12, 1836; all in LR, La Pointe Agency, 1831-1839, M234, Roll 387, RG 75, NA. In addition to his lumber interests, Hercules Dousman was partners with Joseph Rolette and Henry Sibley in the Western Outfit of the American Fur Company. See Rhoda R. Gilman, "Last Days of the Upper Mississippi Fur Trade," *Minnesota History* 42 (Winter, 1970), p. 125. Hercules Dousman was also one of the witnesses to the signing of the Treaty of July 29, 1837, and is specifically listed in Article 4 of the treaty as the recipient of $5,000 for a claim against the Indians. *7 Stat.*, 536, Kappler, *Indian Affairs*, Vol. II, p. 492.

area had entered into formal but unauthorized agreements, allowing white men to cut timber in exchange for tobacco and ammunition.[10] Federal Indian agents expressed concern about the extent of this activity. The instructions to the treaty commissioners seeking a land cession in 1837 specified that existing agreements between Indians and white lumbermen for lumbering and mill privileges in Chippewa country would be negated and that the Chippewa would be prohibited from entering into additional agreements with non-Indians.[11]

[10] Verplanck Van Antwerp, "Proceedings of a Council Held by Governor Henry Dodge with the Chief and Principal Men of the Chippewa Nation of Indians, Near Fort Snelling, at the Confluence of the St. Peter's and Mississippi Rivers, Commencing on the 20th day of July, 1837," Documents Relating to the Negotiation of Ratified and Unratified Treaties 1801-1869, Ratified Treaties, 1833-1837, T494, Roll 3, fr. 561, RG 75, NA [hereafter "1837 Treaty Proceedings"]. (Frame numbers on microfilm rolls for the 1837 Treaty proceedings will be included, since new pagination began with each day of treaty negotiations.) Flatmouth explained to Dodge that the chiefs from the Chippewa River had "granted a privilege to some men, of cutting timber on some of their lands; for which they are paid in tobacco and ammunition." An unauthorized contract to allow timber cutting in Indian country was made in the winter of 1836-37, but was never ratified. It is referred to with disapproval, see Lt. Col. William Davenport to General Jones, Adjutant General, Washington, D.C., June 3, 1837, LR. St. Peter's Agency, 1837-1839, M234, Roll 758, RG 75, NA.

[11] C. A. Harris, CIA, to Henry Dodge and Gen. W. R. Smith, May 13, 1837, Letters Sent By the Office of Indian Affairs (LS), January 28-June 20, 1837. M21, Roll 21, RG 75, NA.

The Treaty with the Chippewa of July 29, 1837 did not envision the Indians' immediate removal or relocation from the ceded lands although it did place limitations on usufructuary rights. The treaty was one of cession, however, and correspondence from federal agents who negotiated the treaty, from observers of the council and indirectly from the Chippewa themselves, suggests the anticipation of eventual removal to an area west of the Mississippi River. In this respect, the 1837 treaty was drafted within the framework of prevailing federal Indian policy of the 1830s.

1.1 The Policy of Removal

The idea of removing Indian tribes to lands beyond white settlement gained gradual momentum as a preferred policy of the United States government during the first three decades of the nineteenth century. The primary thrust of the federal policy toward tribal entities between 1783 and 1815 had been to obtain land for an advancing frontier by whatever means necessary, coupled with an effort to save tribal members from extinction by inculcating them in the ways of the dominant Anglo-American society.[12] As policy makers grew weary of the piecemeal approach of negotiating treaties of cession in order to validate the steady tide of non-Indian encroachment, they increasingly supported the idea of inducing eastern tribes to exchange their land holdings for new territory west of

[12] Reginald Horsman. *The Origins of Indian Removal*, (Michigan State University Press. 1970), p. 4.

the Mississippi River. This concept reached full culmination in the aggressive removal policy of President Andrew Jackson during the 1830s.[13]

Vigorous application of the removal policy is most often associated with efforts to relocate, often forcibly, southeastern Indians known as the Five Civilized Tribes (Cherokee, Creek, Choctaw, Chickasaw, and Seminole). The confrontation that ensued between the Cherokee and the state of Georgia in the early 1830s unsnarled President Andrew Jackson and Supreme Court Chief Justice John Marshall in the well-known dispute of *Cherokee Nation v. Georgia* and *Worcester v. Georgia*. Both decisions proved to be hollow victories for the tribes. The Jackson administration was aggressive in its efforts to negotiate removal treaties with numerous tribes, in the North as well as in the South. Although the Indian Removal Act, passed in May, 1830, envisioned voluntary migrations, the Jackson government was determined to use whatever coercive means were necessary to effect its ends.[14] In his state of the Union message to Congress, the President declared that his plan to remove the Indians "ought to be

[13] Francis Paul Prucha. *The Great Father: The United States Government and the American Indians*. 2 vols. (Lincoln: University of Nebraska Press, 1984), Vol. I, p. 183.

[14] Prucha, *The Great Father*, Vol. I, p. 213; Prucha, United States Indian Policies, 1815-1860, in *Handbook of North American Indians*, William C. Sturtevant, Gen. Editor. *History of Indian-White Relations*, Wilcomb E. Washburn, Vol. Editor, (Washington: Smithsonian Institution. 1988), p. 45.

persisted in till the object is accomplished, and prosecuted with as much vigor as a just regard to their circumstances will permit, and as fast as their consent can be obtained."[15]

The removal policy also applied to the tribes living above the Ohio River. The major tribal entities involved with lands in Wisconsin and/or Minnesota included the Winnebago, Sauk and Fox, Potawatomi, Ottawa, eastern Sioux, Menominee, and Chippewa. While the southeastern tribes were organized into five major Indian nations that had long tenure on land holdings that were relatively well-defined, the northern tribes were numerous, often split into small bands, with territorial boundaries that were usually ambiguous and overlapping. These northern tribal groups also had a long tradition of shifting their locales periodically. In fact, according to one noted twentieth century historian, none of the tribes north of the Ohio was on precisely the same land in 1830 that they had occupied at the time of first contact with the French in the seventeenth century.[16]

During the removal period, a number of treaties were signed with the tribes of the Old Northwest (encompassing Ohio, Michigan, Indiana, Illinois, and Wisconsin) as well as those having land in Iowa, Minnesota, and Missouri. The treaties negotiated with the northern tribes often provided for land cessions, the concentration of displaced tribal members on remaining lands, and the

[15] Fred L. Israel, ea., *The State of the Union Messages of the Presidents, 1790-1966*, 3 Vols., (New York: Chelsea House, 1966), Vol. I, p. 438.

[16] Prucha, *The Great Father*, Vol. I, pp. 243-244.

retention of the privilege of hunting, fishing, and gathering on the ceded lands until they were surveyed and sold.[17]

By 1830, a succession of treaties had cleared Indian title to most of Ohio, Indiana, and Illinois, leaving only scattered enclaves of tribal members. In Michigan and Wisconsin, however, non-Indian settlement was largely confined to the southern and central counties. Most of the region, as well as most of Minnesota, retained much of its tribal population and became a refuge for Indians displaced from other northern locations.[18] In the North, the proximity of British North America provided an alternative emigration option not available to the southern tribes. Many Potawatomi, Ottawa, and Chippewa, as well as members of other smaller groups, chose Canada for their new homes over the usual removal areas of Iowa, Kansas, and Oklahoma.[19]

1.2 The 1837 Treaty with the Chippewa

Congressional authorization for treaty negotiations with the Chippewa in 1837 clearly indicated that the United States anticipated the eventual removal of Chippewa from the ceded lands. Congress directed the Indian Office to hold "treaties with the various tribes of Indians east of the Mississippi River, for the cession of lands held

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[17] Ibid., pp. 244-245.

[18] Prucha, *The Great Father*, Vol. I. p. 245.

[19] Ibid.; see for example *Annual Report of the Commissioner of Indian Affairs*, 1840, (Washington: J. Gideon, Jr., Printer, 1840), pp. 20-21.

by them respectively, and for their removal west of the Mississippi."[20] Less than three months following the appropriations act, Commissioner of Indian Affairs C. A. Harris issued instructions to government negotiators, making it clear that the government would "procure" Chippewa lands for specific consideration under treaty terms, and that the Indians would not retain the lands (Figure 1). Harris urged federal negotiators for the 1837 treaty to obtain the land east of the Mississippi River and south of the 46th meridian, in order to make available to United States' citizens "an extensive wood land." Commissioner Harris emphasized that "[T]he rapidity with which settlements [were] multiplying" made the acquisition of the land especially important.[21]

During the treaty negotiations with the Chippewa in 1837, treaty commissioner and Wisconsin Territorial Governor and Superintendent of Indian Affairs, Henry Dodge, was clear about the federal government's intent to have the Chippewa cede their lands in return for consideration, and to allow hunting and fishing privileges on the ceded area only temporarily and at the discretion of the President. Chief Flatmouth, a spokesman for the Chippewa at the treaty council, told Dodge that the Indians "wish to reserve the privilege of making sugar from the trees and getting their living from the lakes and rivers, as they have done heretofore, and of

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[20] Act of March 3, 1837, 5 *Stat.*, 158.

[21] C. A. Harris, CIA, to Henry Dodge and Gen. W. R. Smith, May 13, 1837, LS, January 28-June 20, 1837, M21, Roll 21, RG 75, NA.

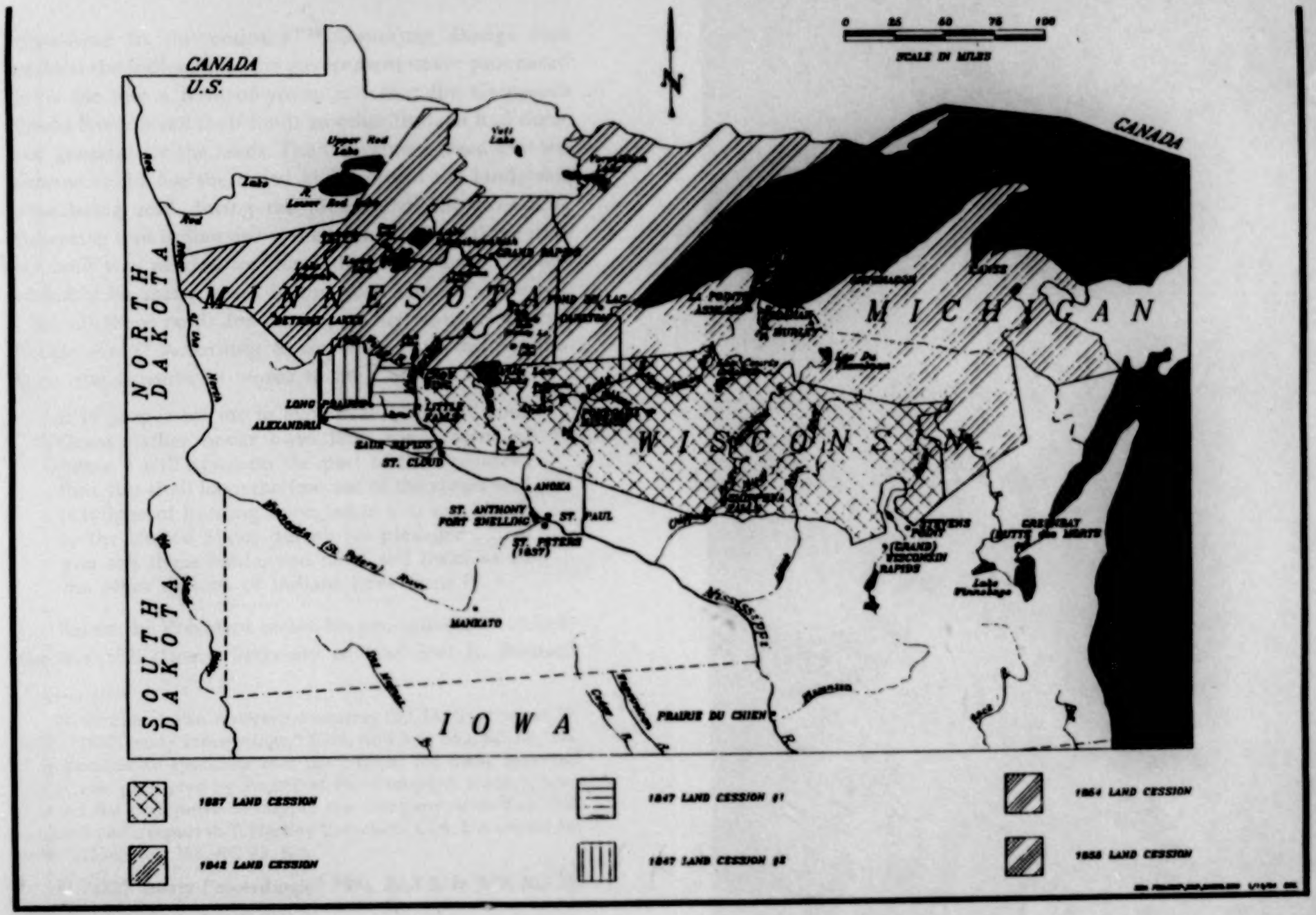

Figure 1

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remaining in the country."[22] Governor Dodge had advised the Indians that the government never purchased lands for just a term of years, and that the Chippewa would have to sell their lands as other Indians had done, and get paid for the lands. The Governor agreed that the Indians could use the rivers and hunt on the lands that were being sold during the pleasure of the President, indicating that Indian use of the land could continue until the land was needed for non-Indian settlement. "It will probably be many years before your Great Father will want all these lands for the use of his white children," Dodge said.[23] According to the journal of the negotiations, the Governor's words to the Chippewa were:

> It is proper for me to explain to you that your Great Father never buys land for a term of years. I will agree on the part of the President that you shall have the free use of the rivers and privilege of hunting upon lands you are to sell to the United States during his pleasure . . . If you sell these lands, you must sell them as all the other nations of Indians have done.[24]

Before the President issued his proclamation confirming the 1837 treaty, Secretary of War Joel R. Poinsett

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[22] Verplanck Van Antwerp, Secretary to CIA, September 30, 1837, "1837 Treaty Proceedings," T494, Roll 3, fr. 560, RG 75, NA. It is possible to speculate that the request for these reserved rights was prompted by American Fur Company traders, who wanted the Chippewa to supply the company with fish. See Lucius Lyon's report to T. Hartley Crawford, CIA, December 16, 1839, M234, Roll 388, RG 75, NA.

[23] "1837 Treaty Proceedings," T494, Roll 3, fr. 559, RG 75, NA.

[24] Ibid., fr. 559.

advised the Committee on Indian Affairs of the importance of carrying out the 1837 treaty. Poinsett believed that Congress had authorized the treaty on the basis of information provided by agents and others from the area, and in order "to carry out the views and policy of the government in removing the Indians from all the lands east of the Mississippi."[25]

Following the 1837 treaty, various people, including some in the Indian Office, continued to refer to it as a treaty in which the Indians relinquished their lands, for the use of anticipated settlement by whites. The consistent federal view was that the Chippewa privilege to hunt and to engage in other activities on the ceded lands was temporary only, and that, in the future, the Chippewa would have to move north or west and cease activities in the ceded area. The treaty allowed the United States to acquire a "vast region . . . abounding in timber adequate to the wants of the settlers, who are thronging to Wisconsin, and those of the inhabitants on the borders of the Mississippi River . . . ," according to Commissioner Harris, in 1837. As a result of the treaty and similar treaties with other tribes, Harris foresaw that "the Indian population will be removed further from the frontier of the States . . . "[26]

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[25] Joel R. Poinsett, Secretary of War, to Sen. L. F. Linn and Senate Committee on Indian Affairs, Report, March 19, 1838, LS. November 28, 1837-March 31, 1838, M21, Roll 23, RG 75, NA.

[26] *Annual Report of the Commissioner of Indian Affairs, 1837,* (New York: AMS Press, Inc., 1976), Vol. III, pp. 526-527; see also *Annual Report of the Commissioner of Indian Affairs, 1840,* (New York: AMS Press, Inc., 1976), Vol. VI, p. 233, where the commissioner refers to the various bands of Chippewa and other Indians who "will soon require a western home."

The Chippewa "ceded all their country to the United States in 1837, (reserving the usufructuary right alone, during the pleasure of the President)," a Chippewa subagent confirmed in 1840. The time is not "far distant" when removal of these Indians "will be rendered necessary, the same agent concluded.[27] Fur trader Lyman Warren wrote to the Governor of Wisconsin in 1841 that the Chippewa of the lower Mississippi, Snake and St. Croix Rivers, and Lake Mille Lacs had advised him that they were prepared to move west, as "soon as their Great Father was prepared to receive them." A tract of land belonging to the Lower Sandy Lake Band in Minnesota seemed an appropriate location to collect all of the Chippewa bands, Warren concluded.[28] In 1842, rumors spread that the Chippewa Indians would be removed from the territory of Wisconsin in May or June of that year.[29] Later governmental understandings also confirm that the treaty contemplated eventual removal of the Indians.[30]

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[27] *Annual Report of the Commissioner of Indian Affairs, 1840,* p. 339 (Agent D. P. Bushnell's report). See also Daniel Bushnell to Gov. Henry Dodge, September 30, 1840, LR. La Pointe Agency, 1840-1843, M234 Roll 388, RG 75, NA.

[28] Lyman Marcus Warren to Governor James D. Doty, October 2, 1841, LR, La Pointe Agency, M234, Roll 388, RG 75, NA.

[29] Thomas Bland to Representative Joseph Johnson, February 5, 1840, LR, Wisconsin Superintendency, 1836-1840, M234, Roll 948, RG 75, NA. This letter was forwarded by Rep. Johnson to Commissioner of Indian Affairs T. Hartley Crawford. Bland wanted his son's steamboat employed for the rumored removal.

[30] In 1847 and 1848, Commissioner William Medill's Annual Reports addressed the subject of Chippewa who

The Indian parties to the 1837 treaty expressed concern and regret about the treaty after it was signed. Those expressions make clear that the Chippewa also considered the treaty to be a relinquishment of land, and understood that at some future time they would have to leave the area. In 1840, Chippewa chiefs wrote to the United States President: "We have sold all, and are now very poor . . . We sometimes fear that our children, when they come to be sent away from the lands, which we have sold from them, may be foolish and do like some of the other Inds. we hear of."[31] Earlier, the Reverend Frederick Ayer, an Indian missionary at Pokegama on the Snake River, had written a cover letter to President Van Buren, transmitting speeches of various Chippewa chiefs who had

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continued to live in the 1837 ceded area. These Indians were "under obligations to remove whenever required by the President," Medill said. *Annual Report of the Commissioner of Indian Affairs, 1847*, (New York: AMS Press, Inc., 1976), Vol. XIII. p. 740. "For the convenience and benefit of the white population, as well as their own good, they should be notified at an early period to leave these lands, and to seek a land of their own further north." These Chippewa "should soon be required to leave [the ceded area] for their own country," Medill advised in 1848, *Annual Report of the Commissioner of Indian Affairs, 1848*, (New York: AMS, Inc., 1976), Vol. XIV, p. 388. See also Orlando Brown, Annual Report of the Commissioner of Indian Affairs, 1849," *House Executive Document 5*, 31st Cong., 1st sess., serial 570, pp. 943-944. In his 1849 report, Brown suggested that rapidly increasing numbers of immigrants to Minnesota Territory necessitated removal "at an early day."

[31] Hole-in-the-Day and other Chippewa Chiefs, Petition to the President, October 16, 1840, LR, La Pointe Agency, 1840-1843, M234, Roll 388, RG 75, NA. One of the Signatories to this petition was "Feather," from the Mille Lacs(?) Band.

complaints about the treaty.[32] The Chippewa wanted more money than they had agreed to in the treaty, and they felt that they had not been compensated sufficiently for timber and fish taken by whites. They also believed that they were being mistreated by traders and they wanted a small area of land reserved for their use within the ceded area. One chief wondered, "When the whites come among us, where will our children go?"[33] The contemporaneous remarks of the Chippewa evidence an understanding that the Indians had given up their rights to the land, and that neither they nor their children would be able to remain on it indefinitely.

Local missionaries who advised and listened to the Chippewa also recognized that after the 1837 treaty, the Indians would have to move out of the area that they had ceded. Reverend Ayer wrote a letter to a fellow missionary in 1837, expressing his concern for the welfare of the Chippewa because they could "be removed at the pleasure of the Government." The Chippewa "have sold their

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[32] Rev. Frederick Ayer, to President Martin Van Buren, September 30, 1837, LR, La Pointe Agency, 1831-1839, M234, Roll 387, RG 75, NA. A transcription of the Chiefs' speeches follows Ayer's letter, at frames 103-105. The Indians' speeches were made at a council on the Snake River shortly after the 1837 treaty council, on September 25, 1837. Pokegama is situated southeast of Mille Lacs, see Figure 1.

[33] Chiefs' Speeches, Speech of Buffalo, September 25, 1837, LR, La Pointe Agency, 1831-1839, M234, Roll 387, RG 75, NA. Ayer had his own complaint. The Chippewa had tried to give a tract of land to Ayer's mission at Pokegama, but were prohibited from doing so. See, Rev. Frederick Ayer, to President Van Buren, postscript. September 30, 1837, LR, La Point Agency, 1831-1839, M234, Roll 387, RG 75, NA.

home," Ayer said, "and they fear that should the Government ere long drive them away and settle them elsewhere they might not find it easy to subsist upon the chase,"[34] Because of the expectation of removal, Ayer said, the prospect of "permanently benefiting the Indians in this region is groundless."[35] Early in the following year, Ayer wrote to Governor Dodge, asking "how soon" it would be before the Chippewa had to be removed from the ceded lands. Ayer was concerned about the Indians farming the ceded lands if they would have to leave without remuneration for their efforts.[36] In an August, 1837 letter, missionary William Boutwell confirmed that the issue of removal had been part of the 1837 treaty, but implied that the timing of removal was not clear. He explained that "we know not when it will be the Presidents good pleasure to remove the Inds. whether 5, 3 or even 2 years." Boutwell added that the government would have trouble with the Chippewa "before 5 years should they attempt to remove them." He concluded that the Chippewa "have no idea of leaving their country while they live – they

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[34] Rev. Frederick Ayer, to David Greene, October 4, 1837, American Board of Commissioners for Foreign Missions (ABCFM), Papers, Correspondence. 1827-1878, Box 2. June. 1836-1839. MHS. St. Paul, Minnesota.

[35] Ibid., Ayer quotes his fellow missionary, Congregationalist William Thurston Boutwell on the apparent hopeless prospects for the Chippewa.

[36] Rev. Frederick Ayer to Governor Dodge, February 1838, (no day given in original), Records of the Wisconsin Superintendency, Letters Received, 1836-1840, M951, Roll 1, RG 75, NA. Ayer also asks in his letter whether the Chippewa will be moved to their own unceded territory or to lands farther west.

know nothing of the duration of a mans pleasure."[37] Later observations from missionaries also expressed the understanding that removal was anticipated under the terms of the 1837 treaty.[38]

2.0 MILLE LACS PARTICIPATION IN THE CHIPPEWA TREATY OF 1842

After the 1837 treaty, the Mille Lacs Band expressed comments, complaints and desires related to their understanding of the treaty provisions. Like other Mississippi bands, the Mille Lacs continued to visit Taliaferro, in Sioux country, and expressed a desire for an agent in the

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[37] William Boutwell to David Greene. August 17, 1837, ABCFM, Papers, Correspondence, 1827-1878, Box 2, June 1836-1839. MHS, St. Paul, Minnesota. See also S. Hall to the Mission Board. August 2, 1850, ABCFM, Papers, Correspondence, Box 5, 1848-1851, File 7, July-Dec., 1850, MHS, St. Paul, Minnesota.

[38] 33 Rev. Sherman Hall to Rev. S. B. Treat, February 25, 1850, ABCFM, Papers, Correspondence, 1827-1878, Box 5, 1848-1851, File 6, MHS, St. Paul, Minnesota. This letter says that the Indians "manifest no great excitement" on being informed they will have to remove, and that they had agreed to remove under the terms of the 1837 treaty, and the later treaty of 1842. However, the letter also indicates that the Indians had not actually expected to have to remove, "at least until the time they should receive the last payment for their land." As discussed below, the timing of the contemplated removal may well have been at issue. In his August 2, 1850 letter to the Mission Board, Hall explained that in 1837 the Indians "sold their lands to the government" and were granted occupancy privileges for hunting and other purposes, until "the President should notify them that they must remove." ABCFM, Papers, Correspondence, Box 5, MHS, St. Paul, Minnesota.

Mississippi area.[39] An agent had been appointed for the Chippewa, first at La Pointe, and then at Crow Wing (see Figure 1). However, the Crow Wing agent resigned in early 1839, after which the Mississippi Chippewa were required to collect their annuities at La Pointe from agent Bushnell.[40] The complaint about the location of an agent and agency probably form the bulk of the concerns with

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[39] As noted above, Taliaferro also lobbied vigorously for an agent in the Mississippi area for his former charges. E.g., Taliaferro to Gen. William Clark, June 27, 1827, *Taliaferro Papers*, Roll 2, MHS, St. Paul, Minnesota. His early efforts, especially, may have been somewhat influenced by his dislike for Henry Schoolcraft, the Indian agent at Sault St. Marie who was assigned jurisdiction over the Mississippi Chippewa in 1827. See Taliaferro to Schoolcraft, December 1, 1827, *Taliaferro Papers*, Roll 2, MHS, St. Paul, Minnesota, for an example of Taliaferro's dislike for Schoolcraft.

[40] E.g., Rev. Frederick Ayer to David Greene, August 4, 1839, ABCFM, Papers, Correspondence, 1827-1878, Box 2, June, 1836-1839, MHS, St. Paul, Minnesota; Henry Dodge to T. Hartley Crawford, CIA, March 25, 1839, L,R, Wisconsin Superintendency, 1836-1840, M234, Roll 948, RG 75, NA. Efforts before 1837 to establish an agent at Crow Wing failed when one agent "declined to enter upon the duties of his appointment and returned to Prairie du Chien," and another (William Sinn) drowned while drunk, see Taliaferro to Elbert Herring, CIA. February 2, 1836, *Taliaferro Papers*, Roll 2, MHS, St. Paul, Minnesota; William Sinn to Lewis Cass, Secretary of War, July 4, 1836; L. Stambaugh to C. A. Harris, CIA, October 12, 1836; Dodge to Harris, CIA, November 16, 1836, all in LR, La Pointe Agency, 1831-1839, M234, Roll 387, RG 75, NA. Miles Vineyard had been appointed agent at Crow Wing in 1837, but resigned in 1839. Vineyard to T. Hartley Crawford, CIA, January 20, 1839; Dodge to Crawford, CIA, February 8, 1839, both in LR, Wisconsin Superintendency, 1836-1840, M234, Roll 948, RG 75, NA.

the 1837 treaty provisions. The Mille Lacs Band also wanted to travel to Washington, D.C., to discuss the treaty with the President, as they felt that this trip had been promised as part of the treaty.[41] In none of these remarks did the Mille Lacs or any other Mississippi band express an understanding that they had permanent rights to use or stay on the ceded lands indefinitely. Moreover, Federal officials and others discussed the issue of removal from ceded lands with the Chippewa after the treaty. Records of these discussions indicate that the Indians were not opposed to having to relocate eventually to unceded lands. In fact, reports of the Indians' views, including those of the Mille Lacs, indicate that the Chippewa were willing to move west, "as their great Father was prepared to receive them . . . "[42]

Non-Indians in Wisconsin began clamoring for minerals in unceded Chippewa lands around Lake Superior, in 1840.[43] Other Wisconsin residents joined in the call for

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[41] Lawrence Taliaferro to Henry Dodge, with request from Chippewa chiefs, June 26, 1839, LR, Wisconsin Superintendency, 1836-1840, M234, Roll 948, RG 75, NA. The Indians' request was formulated at a council held at Fort Snelling on June 24, 1839. Part of the request was that Taliaferro accompany the Indians to Washington.

[42] Lyman Marcus Warren to James D. Doty, October 2, 1841; James D. Doty to John C. Spencer. Secretary of War. November 17, 1841, both in LR, La Pointe Agency, 1840-1843, M234, Roll 388, RG 75, NA.

[43] Petition, Wisconsin citizens to Joel R. Poinsett, Secretary of War, March 20, 1840; Henry Dodge to Poinsett, April 1, 1840; L. Sterling to James D. Doty, forwarding the Wisconsin citizens' petition, March 22, 1840, all in LR, Wisconsin Superintendency, 1836-1840, M234, Roll 948, RG 75, NA.

speedy removal of Indians in 1841.[44] In 1840, Territorial Governor Dodge proposed a treaty to acquire title to Indian lands around Lake Superior.[45] By late 1841, Chippewa around the lake were anticipating a federal request for their lands.[46] By then, Congress had appropriated money for treaty negotiations to get more Chippewa land, and the United States was contemplating a treaty that would remove the Lake Superior Chippewa west of the Mississippi.[47]

Robert Stuart, a former agent with the American Fur Company, was appointed to negotiate a treaty for a Chippewa land cession in 1842. The principal objective of the negotiation was the acquisition of land in Michigan. However, Stuart proposed securing additional lands north of the boundary of the 1837 ceded area, including

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[44] Petition, Citizens of Washington and Milwaukee Counties to Governor James D. Doty, August 6, 1841, LR, Wisconsin 1841-1848, M234, Roll 949, RG 75, NA.

[45] "Report of Governor Dodge," in *Annual Report of the Commissioner of Indian Affairs, 1840,* (New York: AMS Press, Inc., 1976), Vol. VI, p. 332. The main reason for a treaty would be to attach the Bands to the United States Government rather than to the British Government. Dodge explained that the Fond du Lac and La Point Bands were "desirous of selling" part of their country.

[46] Rev. Leonard Wheeler to David Greene, September 23, 1841, ABCFM, Papers, Correspondence, 1827-1878, Box 3, 1840-April, 1844. MHS, St. Paul, Minnesota; James D. Doty to John C. Spencer, Secretary of War November 17, 1841, LR, La Pointe Agency, 1840-1843, M234, Roll 388, RG 75, NA.

[47] The Act of March 3, 1841 appropriated funds for treaty negotiations.

territory in Wisconsin.[48] Removal would not present any immediate problem under Stuart's plan: "It will not be necessary to remove the Indians, until the land shall be required for settlement . . . unless the policy of the Government should require it," he concluded.[49] Commissioner of Indian Affairs, T. Hartley Crawford agreed that Wisconsin lands should be included in a treaty and specifically instructed Stuart that "there must be a stipulation that they will remove from the land ceded, to that which will remain to the Chippewas west of the cession . . . "[50]

At the La Pointe treaty council in 1842, the Indians were advised that the United States would treat them as a nation, on the principle that all the lands were common property that "the majority of the nation can sell or not as they please."[51] The treaty provided that the Mississippi and Lake Superior Chippewa were entitled to use the ceded lands for hunting and "the other usual privileges of occupancy until they were required to remove by the President."[52] The ceded lands were in Michigan and Wisconsin, immediately north and west of the lands ceded in

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[48] Robert Stuart to John C. Spencer, July 27, 1842, LR, Michigan Superintendency, 1842-1845, M234, Roll 425, RG 75, NA.

[49] Ibid.

[50] T. Hartley Crawford, CIA, to Robert Stuart, August 1, 1842, LS, Feb. 24-Oct.2, 1842, M21, Roll 32, RG 75, NA.

[51] Robert Stuart to T. Hartley Crawford, CIA, March 29, 1844, LR, La Pointe Agency, 1844-1847, M234, Roll 389, RG 75, NA. Stuart reconstructs his September 29, 1842 and October 2, 1842 speeches to the Chippewa in this letter.

[52] Treaty of October 4, 1842, 7 *Stat.*, 591, Kappler, *Indian Affairs,* Vol. II, pp. 542-545.

1837, up to the shores of Lake Superior (see Figure 1). Article III of the treaty provided that:

> whenever the Indians shall be required to remove from the ceded district, all the unceded lands belonging to the Indians of Fond du Lac, Sandy Lake, and Mississippi bands, shall be the common property and home of all the Indians, party to this treaty.

The Mille Lacs and other Mississippi Bands signed the treaty, even though they did not reside on any of the ceded lands, and even though part of the Mille Lacs area had already been ceded and therefore would not be included in the common Chippewa lands.

The Chippewa expressed considerable dissatisfaction about the 1842 treaty after its negotiations.[53] By 1849, when the government actually wanted to remove the Indians, numerous Lake Superior Chippewa argued against removal. One of the justifications for these arguments was that the 1842 treaty had not provided for the removal of Indians from the ceded area, at least so long as the Indians were peaceable and well behaved.[54] However, there are no contemporaneous records of the Mille Lacs contending that behavior was a criterion for continued residency on the 1837 or the 1842 ceded lands.[55] The

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[53] E.g., A. Brunson, Subagent at La Pointe, to John Spencer, attaching statements of Chippewa Chiefs, Jan. 8, 1843, LR, La Pointe Agency, 1840-1843, M234, Roll 388, RG 75, NA.

[54] See the discussion below, in footnote 96.

[55] Chippewa Chiefs, complaining about the treaty in 1842, were not from the Mississippi River area, but were from La Pointe, Lac du Flambeau, and Lac Courte Oreilles. See A. Brunson to John Spencer, attaching statements of the Chippewa Chiefs, Jan. 8, 1843, LR, La Pointe Agency, 1840-1843, M234, Roll 388, RG 75, NA. See also James D. Doty to T. Hartley Crawford, CIA, Feb. 16, 1844, with the speech by Chief Buffalo attached, LR, La Pointe Agency, 1844-1847, M234, Roll 389, RG 75, NA.

1842 treaty language, on the other hand, refers clearly to a future removal from the ceded lands, and to a privilege to hunt and occupy the land only until the Indians would be "required to remove by the President."

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3.1 The Search for Lands West of the Mississippi River

Ohio Democrat William Medill, appointed Commissioner of Indian Affairs by President James K. Polk in 1845, advocated the policy of moving the Chippewa west of the Mississippi River in his first annual report.[56] Expressing a philosophy common to nineteenth-century policy makers, Medill believed that the Chippewa could

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[56] Medill entered the Commissioner's office with little prior experience in Indian affairs, having recently served as second assistant postmaster general. While clearly a political appointment, Medill took his responsibilities seriously. One of the salient features of his administration was an attempt to consolidate and confine Indians to large "colonies" west of the Mississippi River, where they could be educated in the manual arts. Although the implementation of this policy required Indians to move to a new territory, it is distinguishable from the Removal Period in federal/Indian relations that was prevalent during the 1830s. The policy that was pursued by Medill was clearly a precursor to the "reservation policy of the 1850s. For a review of William Medill's tenure as Commissioner of Indian Affairs see Robert M. Kvasnicka and Herman J. Viola's, *The Commissioners of Indian Affairs, 1824-1977*, (Lincoln: University of Nebraska Press, 1979), pp. 29-37.

only prosper if they abandoned the "chase" and became more sedentary.

> Until a change shall have been effected in the feelings and disposition of a tribe, and their wandering and unsettled habits shall have begun to give way to some settled and regular mode of life, there is but a barren field for the moral and intellectual teacher. Such a change can be brought about only by concentrating them within fixed and reasonable limits, where they are given to understand that they are to reside permanently, and where they will reap the benefit of any arrangements they may make for their subsistence and comfort. Game will soon become scarce, and they will be compelled gradually to resort to agriculture and other pursuits of civilized life, when a fruitful opening will be afforded for efforts for their moral, intellectual, and social improvement.[57]

These views prompted Medill to negotiate a treaty with the Winnebagos of Iowa in October 1846. The treaty also required the federal government to acquire land for the Winnebago north of St. Peter's and west of the Mississippi and Medill moved quickly to ascertain how he could fulfill this treaty provision.[58]

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[57] *Annual Reports of the Commissioner of Indian Affairs: 1846*, (New York: AMS Press, Inc., 1976), pp. 219-220. For a general review of nineteenth-century attitudes towards Indians see Bernard Sheehan. *Seeds of Extinction: Jeffersonian Philanthropy and the American Indian*, (Chapel Hill: University of North Carolina Press, 1973), pp. 241-279.

[58] See Article 3, "Treaty With The Winnebagos, 1846," in Kappler, *Indian Affairs*, Vol. II, pp. 565-567.

Wisconsin Territorial Governor and Superintendent of Indian Affairs Henry Dodge solicited information on Chippewa lands west of the Mississippi from Sub-Agent James Hays at La Pointe in late fall, 1846. Dodge wanted to know how many acres of unceded Chippewa land existed west of the Mississippi and whether or not it could provide for all of the Chippewa bands, particularly if some of this territory was reserved for the Winnebago. Hays responded by stating that the Chippewa claimed as many as 12,000,000 acres west of the Mississippi. They also claimed approximately 10,000,000 acres of unceded land east of the river, but north of the 1837 and 1842 cession boundaries. The western acreage could, according to Hays, serve all of the Chippewa, but the agent expressed doubt that it could provide for both the Chippewa and the Winnebago.[59]

A few days later, Dodge directed Hays to reconnoiter the country west of the Mississippi, particularly along the boundary line between the Sioux and the Chippewa that had been established by the Treaty at Prairie Du Chien in 1825. Dodge further instructed Hays to ascertain whether or not the western Chippewa would permit the eastern bands to live among them.[60] Following his winter excursion into Minnesota, Hays reported to Dodge that the area was "founded expressly for the Indians; abounding

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[59] James Hays to Henry Dodge, November 28, 1846, LR, Wisconsin Superintendency, 1841-1848, M234, Roll 949, RG 75, NA.

[60] Henry Dodge to James Hays, November 30, 1846, LR, Wisconsin Superintendency, 1841-1848, M234, Roll 949, RG 75, NA.

in Lakes and Wild Rice, two of the great Staples of the "Indians". The agent added that "It is also the best portion of the Chippewa lands for game and contains thrice the extent of agricultural land which will be needed by the Chippewa should they become a nation of Farmers."[61]

Acting upon Hays' report, Governor Dodge wrote to Commissioner Medill that the area north of St. Peter's and west of the Mississippi to the Sioux boundary line (1825) was "well adapted for the future home of the Winnebago Indians." Dodge also claimed that the 12,000,000 acres of Chippewa land west of the river was well suited to sustain an Indian [Chippewa] population. Dodge recommended that a council be held with the Chippewa and Winnebago at Fort Snelling early in the summer of 1847. In addition to providing for the location of Winnebago on Chippewa land, a purpose of the council would be to negotiate a cession of remaining Chippewa title east of the Mississippi to facilitate an early removal of all Chippewa to lands west of the river.[62]

3.2 The Treaty of 1847

Commissioner Medill considered a treaty council with the Chippewa during the spring of 1847. The goals to be achieved at the council were threefold. First, the

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[61] James Hays to Henry Dodge, February 13, 1847, LR, Wisconsin Superintendency, 1841-1848, M234, Roll 949, RG 75, NA.

[62] Henry Dodge to William Medill, March 26, 1847, LR, Wisconsin Superintendency. 1841-1848, M234, Roll 949, RG 75, NA.

United States sought to extinguish Indian title to the remaining Chippewa lands east of the Mississippi, along the north west shore of Lake Superior, and those in the area to be reserved for the Winnebago. Second, Medill hoped to unite all of the Chippewa on the east side of the Mississippi with those west of the river. By so doing, the commissioner sought to provide cheaper and more efficient services to these bands. Finally, having acquired the necessary lands west of the Mississippi along the boundary with the Sioux, the United States wanted to conclude a treaty with the Menominee Indians whereby that tribe would also move from Wisconsin.[63]

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portion of the money been set apart for the payment of the American Fur Company's claim, then the treaty would have been good.[73]

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[63] G. W. Clinton to William Medill, April 2, 1847, LR, La Pointe Agency, 1844-1847, M234. Roll 389, RG 75, NA; William Medill to Isaac Verplanck, June 4, 1847, *Territorial Papers of the United States, (continued . . .)*

[73] Henry Rice to William Medill, November 6, 1847, LR, La Pointe Agency, 1844-1847. M234, Roll 389, RG 75, NA. The American Fur Company's antipathy to the 1847 Treaty of Fond du Lac can be explained by a genuine fear that future annuities would be supplied on the Mississippi River by other companies, such as that owned by the St. Louis-based House of Chouteau. See for example G. W. Clinton to William Medill, April 2, 1847, LR, La Pointe Agency, 1844-1847, M234, Roll 389, RG 75, NA. Another factor in the trader's opposition to the treaty was passage of the Indian Intercourse Act of 1847. This act, which was a hallmark of Medill's administration, provided that individual Indian debts to traders would not be paid with

Despite the dissatisfaction with the 1847 treaties, Commissioner Medill had achieved an important element in his plan to move and consolidate the Chippewa and other tribes west of the Mississippi. The commissioner viewed this move as being necessary to open lands to non-Indian settlement, while protecting the Chippewa from the less moral aspects of that culture. Moreover, Medill saw the future effort to promote an agrarian society amongst the Chippewa, evident by the provision of blacksmiths and farmers in the 1847 Fond du Lac treaty, as the only way to ensure their survival as a people. Medill believed that his plan was fully consistent with the President's power to move the Chippewa pursuant to the treaties of 1837 and 1842.

3.3 After the Treaty of Fond du Lac

Requests to move the Chippewa to the west side of the Mississippi began soon after completion of the 1847 treaty negotiations. Wisconsin Territorial Governor Henry Dodge wrote to Commissioner Medill in September, 1847, asking him to locate the Chippewa and other Indians to the west side of the river. Dodge's memorial represented the views of his constituency, who had recently petitioned the Commissioner complaining of depredations by Sioux and other Indians. Dodge's solution to the problem created by white settlers moving into the Upper Mississippi country was to have "The Indians under their treaty

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tribal funds. As one historian notes, the act unleashed such a flurry of opposition from the traders that ultimately other matters paled into insignificance." Robert Trennert. "William Medill," in Kvasnicka and Viola, *The Commissioners of Indian Affairs*, p. 32

stipulations . . . be required to leave the country they have ceded to the United States." In anticipation of this move, Dodge recommended that a military post be established on the Mississippi above Fort Snelling to keep the Chippewa, Sioux and other Indians peaceful.[74] Although the United States had failed to extinguish Chippewa title to the remaining lands east of the Mississippi, Dodge anticipated that the acquisition was imminent. He thus recommended the relocation of the La Pointe agency to a point near the mouth of the Crow Wing River.[75]

Commissioner Medill reaffirmed the federal government's commitment to establishing this new agency and a "colony" of Chippewa and other Indians west of the Mississippi in his annual report for 1848.

> It may be said that we have commenced the establishment of two colonies for the Indian tribes that we have been compelled to remove; one north, on the head waters of the Mississippi, and the other south, on the western borders of Missouri and Arkansas, the southern limit of

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[74] Henry Dodge to William Medill, September 7, 1847, Wisconsin Superintendency, 1841-1848, M234, Roll 949, RG 75, NA.

[75] Henry Dodge to William Medill, September 5, 1847. LR, La Pointe Agency, 1844-1847, M234, Roll 389, RG 75, NA. Writing to Medill a few days later. Henry Rice suggested that Sandy Lake would be a good location for the agency because it could be easily supplied from the Mississippi River. Rice's reasons for moving the La Pointe agency suggest that traders at the Lake Superior agency had good cause for concern over the potential loss of trade if the agency were relocated. See Henry Rice to William Medill, September 10, 1847, LR, La Pointe Agency, 1844-1847, M234, Roll 389, RG 75, NA.

> which is the Red river. The northern colony is intended to embrace the Chippewas of Lake Superior and the upper Mississippi, the Winnebagoes, the Menomonies, such of the Sioux, if any, as may choose to remain in that region, . . . [76]

Medill advocated the acquisition of the remaining Chippewa land east of the Mississippi in conjunction with the transfer of the La Pointe agency to the Mississippi and the consolidation of all Chippewa in Minnesota. He viewed this not only as being in the best interest of the Chippewa, as they would be removed from the deleterious effects of white settlement, but also to the fiscal advantage of the federal treasury. Perhaps in anticipation of this move, the Lake Superior Chippewa were not included in any of the three Indian superintendencies in 1848.[77]

3.4 The Executive Order of February 6, 1850

Pressure to effect the consolidation of the Chippewa continued after the replacement of William Medill in June, 1849, with Orlando Brown. Brown's tenure as commissioner was short, lasting only one year, and was marked by very little deviation from the policies of

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[76] *Annual Report of the Commissioner of Indian Affairs*, November 31, 1848, vol. XIV, p. 388.

[77] Ibid., p. 393. Medill also believed that the presence of the Winnebagos and Menominee in the 1847 ceded area would provide a buffer between the Sioux and Chippewa. Eventually, Medill envisioned the Sioux moving farther west. Ibid., pp. 388-390.

Medill.[78] It was not unexpected, then, that the Office of Indian Affairs responded favorably to an October, 1849 resolution from the Minnesota Territorial Legislative Assembly requesting the removal of the Chippewa from the lands ceded in 1837 and 1842.[79]

President Zachary Taylor issued an executive order on February 6, 1850 revoking the privileges of hunting and fishing on the ceded lands that were granted to the Chippewa by the treaties of 1837 and 1842 and ordering them to leave the ceded area.[80] Commissioner Brown wrote Territorial Governor and Superintendent of Indian Affairs Alexander Ramsey that same day informing him that the order had been signed,

> revoking the privileges given temporarily to the Chippewa by Article 5th of the treaty of July 29th, 1837 and article 2nd of that of October 4th 1842 – in the one case, of "hunting, fishing and gathering the wild rice upon the lands, the rivers and the lakes, included in the territory

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[78] For a brief sketch of Orlando Brown's career see Robert A. Trennert's "Orlando Brown (1849-50). in Kvasnicka and Viola, *The Commissioners of Indian Affairs*, pp. 41-47.

[79] Alexander Ramsey to Thomas Ewing, Nov. 7, 1849, transmitting "Joint Resolution relative to the Removal of the Chippewa Indians from the ceded lands within the Territory of Minnesota," October 11, 1849, LR, Minnesota Superintendency, 1849-1856, M234, Roll 428, RG 75, NA. See also, Ronald N. Satz, "Chippewa Treaty Rights: The Reserved Rights of Wisconsin's Chippewa Indians in Historical Perspective," *Transactions of the Wisconsin Academy of Sciences, Arts and Letters*, vol. 79, no. 1 (1991), pp. 53-55.

[80] Executive Order of February 6, 1850, Kappler, *Indian Affairs, Laws and Treaties*, Vol. V, p. 663.

> ceded," and in the other, "the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States."[81]

Brown added that this order "requires also the removal of the Indians to their own territory."[82]

Between the Executive Order of February 6, 1850, and August, 1851, when the Indian Office ordered Agent John S. Watrous to suspend removal of the Lake Superior Bands, a flurry of activity, charges and counter charges attended the administration of Indian affairs in Wisconsin and Minnesota. Contemporaneous and later efforts either to defend or to castigate the Chippewa removal have clouded the perspective not only of this period, but also of the land cessions of 1837 and 1842. Significantly, the focus on removal, its failure and subsequent agreements allowing the Chippewa to remain on reservations within the ceded territory, have overshadowed a major tenet of the February, 1850 order – to rescind the privilege of hunting, fishing and gathering on the ceded lands.

As has been demonstrated by the foregoing discussion, federal Indian policy makers anticipated the eventual removal of Chippewa from the ceded lands since the 1830s. This objective was visible in federal policy as it was applied to tribes in the upper mid-west. It eventually

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[81] Orlando Brown to Alexander Ramsey, February 6, 1850, Records of the Minnesota Superintendency, 1849-1856, M842, Roll 2, RG 75, NA.

[82] Ibid. See also Orlando Brown to John Livermore, February 13, 1850, LS, Feb. 1-Oct. 31, 1850, M21, Roll 43, RG 75, NA.

evolved into the creation of an "Indian colony" under the administration of William Medill in the late 1840s. However, the timing for implementation of this policy was never clearly stated, and the Chippewa and some non-Indians were surprised by the timing of President Taylor's February, 1850 order. Contemporary evidence suggests that many Chippewa and their supporters fully recognized the possibility of removal, particularly following the treaty negotiations at Fond du Lac during the summer of 1847 and the subsequent debate over closure of the sub-agency at La Pointe.[83]

Attention from parties supporting and opposing Chippewa consolidation on western lands quickly focused on the removal aspect of the February order. The Indian Office in Washington persisted in its long-held view that removal and concentration of the Chippewa in one area would allow for better and more cost-effective administration. Minnesotans such as Alexander Ramsey, Henry Sibley and Henry Rice hoped to benefit financially and politically from the payment of annuities at an

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[83] Ronald Satz argues that the Lake Superior Chippewa were "shocked" by news of the order to remove. He also cites to evidence in 1848 and 1849 that indicates that the Chippewa feared an eventual removal. Satz notes that a Chippewa delegation from Lake Superior traveled to Washington in the fall of 1848 to solicit "permanent homes" in the ceded territory. Satz, "Chippewa Treaty Rights," pp. 51-55. The timing of the executive order may be explained by the entrance of Wisconsin into the Union on May 29, 1848 and the establishment of Minnesota Territory on March 3, 1849. It was the first Territorial Assembly that passed the resolution calling for a revocation of Chippewa usufructuary rights and their removal to the unceded lands.

agency on the Mississippi.[84] Similarly, commercial interests tied to the Great Lakes trade strenuously opposed losing La Pointe as a distribution site for annuities and other goods. Local Indian agents at La Pointe and at the newly established Minnesota agencies of Crow Wing and Sandy Lake fought for the survival of their stations.[85] Finally, the missionaries, who operated principally through the American Board of Commissioners for Foreign Missions, voiced either support for or opposition to removal, depending upon the particular benefit that they sought to gain from the policy.[86]

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[84] In a letter to Ramsey in December, 1849, Rice suggested that "Minnesota would reap the benefit" from annuities being shipped north from St. Louis via the Mississippi rather than from Detroit to the shores of Lake Superior. See Henry Rice to Alexander Ramsey, December 1, 1849, Alexander Ramsey Papers, Correspondence and Misc. Papers, Sept. 1849-June. 1850, M203, Roll 4, MHS, St. Paul, Minnesota.

[85] For example, one of the first letters written by newly appointed La Pointe Sub-agent John Livermore to Commissioner Medill in 1848 was a request to designate his station as an agency, rather than a sub-agency and to make him an agent, rather than a sub-agent. In making this request, Livermore acknowledged that he, as well as the Chippewa who he was in contact with, were aware of the government's intention to remove them. Livermore explained that the Chippewa at Lake Superior did not want to move to the Mississippi and that they believed that the land that they occupied "is not such as the white man will soon if ever want to occupy." John Livermore to William Medill, November 8, 1848, LR, La Pointe Agency, 1848-1850, M234, Roll 390, RG 75, NA.

[86] Sherman Hall, for instance, believed that by moving his school and mission from La Pointe to Sandy Lake, he would be given the government contract to run the school at the latter location. Sherman Hall to S. B. Treat, March 28, 1850, ABCFM, Papers, Correspondence, 1827-1878, Box 5, June 1848-1851, File 6, Jan.-June, 1850, MHS, St. Paul, Minnesota.

The Lake Superior and Mississippi Chippewa were caught in the middle of these various forces who battled over their future. The response of the various band leaders to events before and after removal often reflected the particular interest that represented them at the time. For example, Mille Lacs band leader Na-guon-abe writing from La Pointe and through Agent William A. Richmond in October 1848, expressed great concern that annuity payments might be paid at a point along the Mississippi. Although such a distribution site might be closer to his home than La Pointe, the headman feared that the agent on the Mississippi would serve the interests of traders more than the Chippewa. Na-guon-abe restated this complaint to Agent John Livermore a month later after the latter's arrival at La Pointe.[87] One year later, Na-guon-abe was one of a number of Chippewa from Mille Lacs and the Snake River, who petitioned the Commissioner of Indian Affairs through William Warren to have their annuities paid at Crow Wing, the distance being "three fourths shorter and there we see no fire water."[88] The Indian Office received this later petition during the same month that the Minnesota Legislative Assembly was drafting its resolution concerning removal.

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[87] Na-goun-a-bi to William A. Richmond, October 2, 1848 and Na-gona-be to John Livermore, November 14, 1848. LR, La Pointe Agency, 1848-1850, M234. Roll 390, RG 75, NA.

[88] "Petition of Mille Lac and Snake River Chippewa." October 10, 1849, LR, La Pointe Agency, 1848-1850, M234, Roll 390, RG 75, NA.

As federal efforts to move the Chippewa to the newly established agency at Sandy Lake gathered momentum in the summer and fall of 1850, Chippewa resistance to removal also gained strength. Most of the resistance to removal focused on the Lake Superior Chippewa and their reported understanding of the 1842 treaty. Some Chippewa would not contemplate going to the western lands until they received assurance that they would be welcomed by the Mississippi Chippewa.[89] Others, through spokesmen such as William Warren, articulated their understanding of the 1842 treaty negotiations with Robert Stuart. Believing that the United States only wanted minerals from the 1842 ceded lands, they represented an understanding that " 'they would not be removed at any rate during the term of their annuity and probably never.' "[90]

American Board of Commissioners for Foreign Missions Secretary S. B. Treat registered the official opposition of his organization to removal of the La Pointe and Bad River Chippewa in January, 1851.[91] Treat echoed Warren's comments, stating that the Chippewa who were

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[89] Charles H. Oakes to Alexander Ramsey, July 3, 1850, LR, La Pointe Agency, 1848-1850, M234, Roll 390, RG 75, NA. The United States treaty commissioners had been aware of this concern during the prelude to the negotiations of 1847. It was one reason for sending Agent James Hays to talk with the Pillager and other bands west of the Mississippi during the winter of 1846-47.

[90] William Warren to Alexander Ramsey, January 21, 1851, LR, Sandy Lake Agency, 1850-1851, M234, Roll 767, RG 75, NA.

[91] The ABCFM maintained missions at both locations.

parties to the 1842 treaty believed that the northern cession was not needed for agricultural land, but rather for its minerals.

> The Indians were told that they could remain where they were for an indefinite period, except so far as they might be required to give places to miners; and the Commissioner said to them, "You and I shall never see the day when your Great Father will ask you to remove." Had it not been for this assurance, it is presumed, the treaty would never have been consummated.[92]

Treat urged the Commissioner to allow the Lake Superior Indians to remain where they were and to eventually become citizens of Wisconsin.[93] Lake Superior Chippewa later confirmed this view of the 1842 treaty negotiations in a letter to Commissioner Luke Lea. They stated that they were told by treaty commissioner Stuart that the United States wanted the cession only for minerals and that he (Stuart) believed that "it will be a great while before you will be required to remove."[94] In this letter, the Lake Superior Chippewa tied their understanding of the 1842 treaty to the issue of behavior. They stated that Stuart told them "that we and our children after us might be permitted to live on our land fifty years and even a hundred if we lived on friendly terms with the whites." While recognizing that some of the Chippewa

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[92] S. B. Treat to Luke Lea, January 21, 1851, LR, Sandy Lake Agency, 1850-1851, M234, Roll 767, RG 75, NA.

[93] Ibid.

[94] Chippewa to Luke Lea, November 6, 1851, LR, Chippewa Agency. 1851-1853, M234, Roll 149, RG 75. NA.

have had trouble with the whites" they declared that "this is not true of us who live on the lake."[95]

Federal Indian officials, including La Pointe Subagent John Livermore, newly appointed Sandy Lake Agent John Watrous and Superintendent of Indian Affairs Alexander Ramsey implemented the removal part of President Taylor's February order with the annuity payments of 1850. Announcing that the annuities would thereafter only be paid to Chippewa "in their own country," the federal government hoped to entice the Chippewa to relocate

[95] Ibid. The first correlation between misbehavior and removal appearing in federal documents is not established until the late 1840s and early 1850s, when removal seemed a more imminent possibility. The increased threat of removal developed after the 1847 Fond du Lac Treaty; before this risk of removal had intensified, no contemporaneous federal official attempted to tie misbehavior to removal. The one exception to this in the documentary record is an earlier connection between peaceable behavior and not having to remove, drawn by Chippewa Chief, Marten. This appears in Marten's statement, attached to Alfred Brunson's letter to John Spencer, Secretary of War, Jan. 8, 1843, LR, LaPointe Agency, 1840-1843, M234, Roll 388, RG 75, NA.

Although not yet implemented with regards to the Chippewa in 1843, removal clearly remained the central tenet of federal Indian policy as seen in Sub-agent Alfred Brunson's August 1, 1843 letter to Wisconsin Territorial Governor, James D. Doty: "The policy of leaving the Indians on the ceded lands," Brunson was convinced, "is not a good one. It conflicts directly with another and far more preferable policy, long since established, and at which Government has been steadily aiming for the last twenty years – that of separating the Indians from the whites." Report No. 99, Brunson to Doty, Aug. 1, 1843, in *Annual Report of the Commissioner of Indian Affairs*. Vol. IX, (New York: AMS Press, Inc., 1976), p. 438.

west of Sandy Lake.[96] This plan did draw several hundred Chippewa to the fall payment on the east bank of the Mississippi. But, when goods failed to arrive because of a lack of congressional appropriation, disaster befell the Lake Superior Chippewa. According to some accounts, hundreds died from exposure or disease either at Sandy Lake or on the return trip to Lake Superior. The experience of the winter of 1850-51 ensured that Chippewa resistance to removal would only stiffen. It also prompted an outpouring of sympathy for the Chippewa among leading residents of the area and renewed efforts

[96] Agent Livermore's notice to the Chippewa announcing the President's order was issued on April 2, 1850. See "Circular," John S. Livermore, April 2, 1850, LR, La Pointe Agency, 1848-1850, M234, Roll 390, RG 75, NA. Alexander Ramsey considered the Sandy Lake site merely a temporarily convenient location to distribute annuities. Ramsey believed that a permanent Chippewa Agency should be established at Leech Lake. Ramsey acknowledged, however, that to do so, the government would have to make arrangements to provide annuities to the Pillager Band of Chippewa, who claimed that territory as their own. Ramsey clearly understood that a major obstacle to moving the Lake Superior Chippewa to the western lands was the antipathy held by western Chippewa, who did not participate in annuity distribution, toward those east of the Mississippi. See Alexander Ramsey to John Livermore, April 17, 1850 and Alexander Ramsey to Luke Lea, July 16, 1850, both in LR, La Pointe Agency, 1848-1858, M234, Roll 390, RG 75, NA. Other knowledgeable Chippewa observers also considered Sandy Lake only one location for the Chippewa. Removal Agent C. H. Beaulieu noted that only 30-35 families could be maintained at Sandy Lake. Others should be allowed to settle at Leech Lake, Rice Lake, and Lake Winnibigoshish, where conditions were suitable for their subsistence. C. H. Beaulieu to C. W. Borup, April 25, 1850, LR, Minnesota Superintendency, 1849-1856, M234, Roll 428, RG 75, NA.

to allow the Lake Superior Chippewa to remain on their ceded lands.[97]

News of events at Sandy Lake and letters and memorials from "Highly respectable individuals" to the Indian Office convinced Commissioner of Indian Affairs Luke Lea to recommend to the Secretary of the Interior in June, 1851 that he modify the President's order with respect to the removal of the Lake Superior Chippewa. In his letter to the Secretary, Lea specifically referred to the Chippewa bands on Lake Superior and the upper peninsula of Michigan.[98] Approval was forthcoming from the Secretary's Office in August and Lea was able to telegraph Agent Watrous to "Suspend action with reference to removal of Lake Superior Chippewas for further notice."[99]

Federal efforts to remove the Lake Superior Chippewa to the Mississippi River effectively ended in the summer of 1851. However, the threat of such a relocation,

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[97] For a discussion of the 1850-51 winter at Sandy Lake see Satz, "Chippewa Treaty Rights," pp. 57-59 and James Clifton's "Wisconsin Death March: Explaining The Extremes in Old Northwest Indian Removal," in *Transactions of the Wisconsin Academy of Sciences, Arts and Letters*, vol. 75, pp. 1-39.

[98] Luke Lea, CIA, to A. H. Stuart, Secretary of Interior, June 3, 1851, Report Books, 1838-1885, July 25, 1848-June 23, 1851, M348, Roll 6, RG 75, NA.

[99] Luke Lea, CIA, to J. S. Watrous, Indian Agent, August 25, 1851, LS, M21, Roll 45, RG 75, NA. See W.A. Graham, Acting Sec. of the Interior, to CIA, August 25, 1851, Letters Sent by the Indian Division of the Office of the Secretary of the Interior, 1849-1903, March 10, 1849-July 28, 1854, M606, Roll 1, Records of the Indian Division of the Office of the Secretary of the Interior, RG 48, NA; Luke Lea to S.B. Treat, September 5, 1851, LS, M21, Roll 45, RG 75, NA.

principally through the distribution of annuities at places other than La Pointe, continued to plague the Chippewa bands on the lake. A delegation of Lake Superior Chippewa, led by the aged Buffalo, visited Washington in June, 1852 to solicit the government's assurance that they would not have to leave their homes. The documentary evidence is inconclusive as to whether or not the Chippewa actually met with President Fillmore. There is also no evidence that they obtained any document showing a formal, permanent recision of the February 1850 order. What is clear from the available documentary record is that the Chippewa continued to express anxiety about the possibility of their relocation well into 1852 and 1853. Moreover, local Indian agents such as Alexander Ramsey and John Watrous, while fending off charges of negligence for their part in the 1850-51 annuity distribution, continued to believe that the Lake Superior Chippewa would eventually relocate to Minnesota. Given the notoriety attendant to the Chippewa visit to Washington, however, and the strong support that they received from prominent individuals, there seemed little chance that Ramsey's efforts would succeed.[100]

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[100] The only apparent claim that the Chippewa delegation to Washington did meet with President Fillmore in June, 1852, is found in the 1892 reminiscence of Benjamin Armstrong, *Early Life Among the Indians: Reminiscences of Benj. G. Armstrong: Treaties of 1835, 1837, 1842, and 1854: Habits and Customs of the Red Men of the Forest: Incidents, Biographical Sketches, Battles, &.* According to Armstrong, not only were the Chippewa able to have a hearing with President Fillmore. but they were also given a written statement evidencing proof of Fillmore's promise to countermand President Taylor's 1850 revocation order.

The controversy surrounding President Taylor's February 1850 order centered principally on 1] an

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Contemporaneous correspondence suggests, to the contrary, that the delegation was not given the opportunity to meet with Fillmore. Reverend Leonard Wheeler, writing to S. B. Treat from Bad River in July, 1852, explained that the delegation had just returned. Although Wheeler had not yet heard the complete account, he understood that "nothing was effected" by the Chippewas' efforts. See Wheeler to Treat, July 14, 1852. Several months later, Wheeler wrote to Treat, again from Bad River. In this Nov. 20, 1852 letter, Wheeler revealed much more in his description of events: "The delegation that went to Washington last summer accomplished nothing by their journey, and feel not a little mortified at the result, which consisted in their being sent home immediately without a hearing." Wheeler, and his fellow missionary, Sherman Hall, were concerned with the advisability of dismantling the mission at La Pointe and establishing a new mission and school at Crow Wing. Thus, they were directly affected by the prospect of the removal of the Lake Superior Chippewa and needed to know the government's intentions. Both Wheeler letters are found in ABCFM, Papers, Correspondence, 1827-1878, Box 6, 1852-1854, MHS, St. Paul, Minnesota.

Wheeler and Hall's letters also discuss at length the continuing threat of removal and the government's plan to persuade Lake Superior Chippewa to remove by no longer issuing annuities at La Pointe, but at a new agency site on the Mississippi. Wheeler anticipated that "None of the Lake Indians will probably go. They have pretty much given up all expectation of receiving any further aid from govt, and are exerting themselves in various ways to supply their own wants." Wheeler noted that more than the usual number of Chippewa had gone hunting, "their furs bringing them the ready cash or its equivalent in something else." Wheeler to S. B. Treat, Nov. 20, 1852. See also Sherman Hall to S. B. Treat, Aug. 30, 1852; Oct. 7, 1852, all in ABCFM, Papers. Correspondence, 1827-1878, Box 6, 1852-1854, MHS, St. Paul, Minnesota.

interpretation of the Chippewa Treaty of 1842 and 2] efforts to allow the continued residence of the Lake Superior Chippewa on ceded lands. Absent from much of the discussion was specific reference to the Mille Lacs Chippewa, who were parties to both the 1837 and the 1842 treaties.

There are a number of reasons why there was so little discussion of the Mille Lacs in the controversy. First, while signatories to the treaty negotiated at La Pointe in 1842, the lands included in that cession did not encompass lands traditionally held by this band, principally those around Lake Mille Lacs. The southern half of that lake had previously been ceded by the Chippewa treaty of 1837. Second, although the February order rescinding privileges granted to the Mille Lacs and other Chippewa in 1837 and 1842 applied equally to all Chippewa, it was not likely that those Chippewa would be removing any great distance, if at all, given the location of the Mille

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In his annual report for 1852, Commissioner of Indian Affairs, Luke Lea, makes no mention of a countermanding order against Taylor's 1850 executive order. Federal policy with respect to these Chippewa, according to Lea, relied on the strength of the drawing card of issuing annuities at Crow Wing, "a more favorable site," "west of the Mississippi." By paying annuities Only in their own territory, – that is, unceded lands – federal policy makers envisioned "quietly" inducing the Chippewa to "abandon the ceded lands." Lea urged, that with the exception of one or two small bands of Lake Superior Chippewa, "measures should be promptly taken for the concentration of the entire Chippewa tribe within a limited district west of the Mississippi river." Luke Lea, "Annual Report," *House Executive Doc. 1*, 32d Cong., 2d Sess., Serial 673, p. 295.

Lacs on the northern boundary of the 1837 ceded area. Indeed, Superintendent of Indian Affairs Ramsey and Agent Watrous initially believed that the Chippewa on the St. Croix River and those at the Pokegama mission would probably move north to join the Mille Lacs at the lake.[101] However, following a trip to the Mille Lacs country in May, 1851, Watrous learned that lumbermen were operating in the area and that, should the St. Croix bands move there, they would be "exposed to the same vices and surrounded by the same influences that has subjected them to so much degradation on the St. Croix." Watrous suggested that those Chippewa who had already moved to Mille Lacs be allowed to stay at that location, but that any new arrivals be directed to the west side of the Mississippi.[102]

The Reverend Sherman Hall writing from La Pointe to S. B. Treat in March, 1851 also considered Mille Lacs to be an appropriate place to relocate the St. Croix and Pokegama Chippewa as it "is on the southernmost border to the Indian lands." Hall explained that "The line runs through that lake, and gives most of it to the United States." However, Hall was unsure how long the Chippewa could remain at Mille Lacs without confronting settlers coming up the Mississippi River. He commented that "The land on that lake is among the best in the

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[101] John Watrous to Alexander Ramsey, February 28, 1851, Records of the Minnesota Superintendency, 1849-1856, M842. Roll 3, RG 75. NA.

[102] John Watrous to Alexander Ramsey, May 25, 1851, LR, Chippewa Agency Emigration, 1850-1859, M234, Roll 168, RG 75, NA.

country and will probably soon be settled. There is but little hope therefore that they [Chippewa] will remain long undisturbed there."[103]

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Throughout the 1840s and early 1850s, federal officials persisted in their belief that the Chippewa could be relocated from the 1837 and 1842 ceded lands. Eventual consolidation of the various Lake Superior bands with their brethren west of the Mississippi River was an integral component of federal policy in Wisconsin and Minnesota Territory. The Mille Lacs Chippewa, living at the northern edge of the 1837 cession boundary, were less affected by the relocation policy. They were nonetheless subject to the revocation of temporary usufructuary rights pursuant to that earlier agreement. Although the possibility of removal continued to plague the Lake Superior bands after 1851, it was much less of a concern to the Mille Lacs. Rather, these Chippewa faced a new threat to their continued subsistence by the prospect of competition for natural resources from non-Indian immigrants. Fortunately for the Chippewa, as these threats amplified during the early 1850s, the federal government experimented with a new Indian policy that sought to provide Indians with reserved lands within their traditional territory.

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[103] S. Hall to S. B. Treat, March 24, 1851, ABCFM, Papers, Correspondence, 1827-1878, Box 5, June, 1848-1851, File 8, Jan.-Apr., 1851, MHS, St. Paul, Minnesota.

4.0 THE CHIPPEWA TREATY OF 1855

President Millard Fillmore's temporary suspension of his predecessor's February 1850 order effectively ended efforts to physically remove the Lake Superior Chippewa to lands west of the Mississippi River. The President's action, however, did not ensure that there would be no future efforts to remove these Indians from the 1842 ceded area, or that their annuity payments would once again be paid at La Pointe. Both possibilities concerned the Chippewa of the lake and their supporters, and both groups lobbied the Indian Office throughout 1852 and 1853 to obtain a permanent order restoring the annual payments and allowing the Chippewa to remain on reserved lands within the ceded territory.

The Chippewa of the Mississippi experienced similar uncertainties during the early 1850s. Unsure as to where annuities would be paid, or even if they could participate in the payments, the Mississippi Chippewa, particularly those from the St. Croix River area, were said to be in a desperate condition by their agents. Recently appointed Chippewa agent in Minnesota Territory, D. B. Herriman, reported to the new Territorial Governor Willis A. Gorman that he (Harriman) believed that a number of St. Croix Chippewa would die from starvation and cold if goods were not distributed to them. Herriman claimed that many of these Chippewa had complied with the removal order, only to find that federal agents had not provided for them at their new homes. Consequently, they had returned to the ceded lands and were now uncertain of their future. Minnesota Indian Agent Charles H. Oakes underscored Herriman's concern in his letter to Gorman, dated November 15, 1853. Oakes added that he

did not understand "why these Indians should not be entitled to their equal share of the annuities; as many of them did remove from the ceded lands."[104]

4.1 A New Indian Policy

The temporary suspension of removal efforts and the replacement of Watrous and Ramsey with new agents for the Mississippi Chippewa caused a policy vacuum in Minnesota Territory. Congress still wanted to acquire title to all Indian lands east of the Mississippi and to consolidate Chippewa administration as much as possible. However, by 1853, it was apparent to most Indian officials that this would not be accomplished as originally conceived. Fortunately, the need to develop a new policy for the Lake Superior Chippewa coincided with a change in administration at the Office of Indian Affairs and a revamping of Indian policy nationally.

The annexation of Texas in 1845, the settlement of the Oregon question in 1846, and land cessions by Mexico in 1848 added an estimated 200,000 people to the Office of Indian Affairs jurisdiction.[105] This increase and the loss of a definable "Indian barrier" necessitated the development of a new Indian policy. The policy, which evolved gradually during the 1850s and became fully developed after the Civil War, became known as the reservation

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[104] Charles H. Oakes to W. A. Gordon, November 15, 1853; D. B. Herriman to W. A. Gorman, November 10, 1853, LR, Chippewa Agency, 1854-1855, M234, Roll 150, RG 75, NA.

[105] Robert M. Utley, *The Indian Frontier Of The American West: 1846-1890.* (Albuquerque: University of New Mexico Press, 1986), p. 4.

system. This policy initiative provided that new treaties would have to be negotiated to establish Indian enclaves which would isolate tribal members from the new emigrant trails and settlements and yet provide them with sufficient educational and agricultural skills to assure their continued existence in a restricted environment.[106] Ohio Democrat George W. Manypenny espoused the new policy when he took office Commissioner of Indian Affairs in March, 1853. During Manypenny's tenure in office, he oversaw the negotiation of 52 treaties with Indian tribes. A guiding principal [sic] for all of these treaties was the need to define reservations for tribes within their aboriginal lands. Manypenny clearly articulated this policy in his annual report for 1855.

> This wonderful emigration and the expansion of our population into every portion of our territories, where land is found suitable for cultivation, carries the white settlers on either side of and far beyond the homes of the Indians; and as the settlements thus made expand and grow, they will so have adjusted themselves as to forbid the removal of the red man. There will therefore soon be no pretext for a change, as there will be no place to remove the Indian population. The policy of fixed habitations I regard as settled by the government, and it will soon be confirmed by an inevitable necessity; . . . [107]

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[106] Prucha, "United States Indian Policies," pp. 47-48; Robert A. Trennert, Jr., *Alternative to Extinction: Federal Indian Policy and the Beginnings of the Reservation System, 1846-1851*, (Philadelphia: Temple University Press, 1975), pp. vii-viii, 60.

[107] *Annual Report*, 34th Congress, 1st session, Serial 840, (Washington, 1856), p. 338. For a brief biography of George Manypenny see Robert M. Kvasnicka, "George W. Manypenny (1853-57)" in Kvasnicka and Viola, *The Commissioners of Indian Affairs*, pp. 57-67.

Manypenny's interest in delineating reservations for the Chippewa was well-received by the Lake Superior bands and their supporters. A number of "Cheifs (sic), Headmen, and Warriors" of the Wisconsin and Michigan Chippewa petitioned the new Commissioner in October, 1853. Echoing a theme that appeared often in federal writings about Indians, these Chippewa leaders claimed that the events of 1850-51 were actually an attempt to remove the Chippewa "from civilization, to destroy the improvement which exists among us and to cast us back into that roving habit of life from which we are striving to emerge." Rejecting this alternative, they asked for "permanent settlements" as they had been "awakened to the necessity of acquiring a possession, which shall be our own & may not be overflowed by the multitudes who come from your cities and towns to dwell in the forests."[108]

Michigan Indian Superintendent Henry C. Gilbert acknowledged this desire of the Chippewa to have reservations when he arrived with the annuity payment at La Pointe in the fall of 1853.[109] In his report to Commissioner

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[108] Petition to the Commissioner of Indian Affairs, October 24, 1853, LR, Chippewa Agency, 1851-1853, M234, Roll 149, RG 75, NA.

[109] Henry C. Gilbert to George W. Manypenny, December 10, 1853, LR, Mackinac Agency, 1853-1855, M234, Roll 404, RG 75, NA.

The Reverend Leonard Wheeler at La Pointe confirmed in a letter to his father in October, 1853 that the Chippewa were both

Manypenny, Gilbert explained that the Lake Superior Chippewa expressed a number of complaints and concerns about their treatment by the federal government. Gilbert began "First and chief of all is the order heretofore made for their removal. This is the great terror of their lives and I hazard nothing in saying that they will sooner submit to extermination than comply with it."[110] Gilbert underscored the need to treat differently with the Chippewa. While confirming that a suspension of removal efforts was only temporary, he stated that "I deem it important not only that the policy of removal should be abandoned but that such a determination on the part of the United States should be communicated to them in an official form." With this confirmation from the federal government, the Chippewa would be inclined to acquire lands, free from the fear of having to leave them.[111]

Superintendent Gilbert had clearly been apprised of the new federal Indian policy, as he urged the creation of "Reservations, for the common use and benefit of the tribe" in the ceded territory. Acknowledging the importance of promoting agriculture in the new policy, Gilbert claimed that the lands that the Chippewa wanted for reservations were "well adapted to their wants. In many

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surprised and pleased that their annuities were once again paid to them at La Pointe. Leonard Wheeler to Father. October 27, 1853, Wheeler Papers, Correspondence, 1838-1864. Wisconsin Historical Society, Madison, Wisconsin.

[110] Gilbert to Manypenny, Dec. 10, 1853, M234, Roll 404, RG 75, NA.

[111] Ibid.

places the soil is fertile and yields abundantly, potatoes, garden vegetables, oats, hay and all such crops as the Indians can most easily learn to cultivate." Gilbert suggested that the creation of these reservations would meet with the approval of the Chippewa's non-Indian neighbors with whom they lived in "harmony." Superintendent Gilbert suggested that it was a propitious time for the United States to negotiate a new treaty with the Chippewa for the cession of lands along the north shore of Lake Superior that treaty commissioners Verplanck and Rice had failed to acquire in 1847. Gilbert posited that, although the Chippewa considered this land valuable, they would be willing to cede it to the United States in exchange for reservations.[112]

The good relations alluded to by Henry Gilbert were borne out by actions of the Wisconsin Legislature. Legislators memorialized the President in February, 1854 to "rescind the orders heretofore given for the removal of said Indians, and that such orders may be given in the premises, as shall secure the payment to said Indians, of their annuities at La Pointe." The memorial also requested that Congress pass the necessary laws "to encourage the permanent settlement of those Indians as shall adopt the habits of the citizens of the United States."[113]

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[112] Ibid.

[113] Memorials and Resolutions. February 27, 1854, Memorial no. 8, "Memorial to the President and Congress of the United States, relative to the Chippewa Indians of Lake Superior, *General Acts Passed by the Legislature of Wisconsin, in the Year Eighteen Hundred and Fifty-Four, Together with Memorials and Resolutions*, (Madison: Printed by David Atwood, 1854), pp. 156-157.

The Wisconsin Legislature's actions were indicative of the mood in the upper Midwest and in Congress to resolve the longstanding problem with the Chippewa and the lands ceded in 1837 and 1842. South Carolina Representative James Orr expressed congressional sentiment in discussing the bill to extinguish the remaining Chippewa title to lands in Wisconsin and Minnesota. He explained that the bill "proposes to introduce a new feature in our Indian relations." In describing the previous Indian policy, Orr concluded that "we have had experience enough that the policy which we have heretofore pursued of extinguishing the title to the Indian lands, removing them further West, and paying them large money annuities, has been demonstrated by experiment to be an utter failure."[114] Commissioner of Indian Affairs George Manypenny had the new Indian policy in mind when he instructed Superintendent Henry Gilbert to travel to La Pointe and, in concert with Minnesota Agent D. B. Herriman, "make a treaty with the Chippewa Indians of Lake Superior and the Mississippi."[115] These and subsequent instructions defined the principal objectives of the United States as 1) acquiring title to all remaining Chippewa lands in Minnesota and Wisconsin; 2) providing as few reservations as possible; and 3) incorporating in the treaty provisions for the eventual allotment of reservation land to individual Chippewa.[116]

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[114] *The Congressional Globe*, May 1, 1854, House of Representatives (Washington. 1854), Vol. 28, Part II, p. 1032.

[115] George Manypenny to Henry C. Gilbert, August 11, 1854, LS, March 28-Aug. 26, 1854, M21, Roll 49, RG 75, NA.

[116] Ibid. In line with the new reservation policy, and recognizing the need for agricultural development on

The enmity between the Lake Superior and the Mississippi Chippewa engendered by participation and distribution of annuities during the past decade prevented Gilbert and Herriman from negotiating a cession of the north shore lands with both groups at La Pointe in September 1854. As Gilbert apologetically explained to Manypenny when transmitting the treaty, "the Mississippi Indians could not be induced to sell their land on any terms. Much jealousy and ill feeling existed between them and the Lake Superior Indians and they could not even be prevailed upon to meet each other in council." Gilbert noted, however, that all of the Chippewa were "anxious that a division should be made of the payments to become due under former existing treaties and a specific apportionment made between the Mississippi and the Lake Superior Indians and places of payment designated." Capitalizing on this one point of agreement, Gilbert and Herriman were able to establish a boundary between the Lake Superior and the Mississippi bands.[117]

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reservations, the United States Senate wanted to provide annuities that were useful for agriculture. Manypenny instructed Superintendent Gilbert to insert a clause in the next treaty to be negotiated with the Chippewa that would provide "a fund establishing farms among and for them." See George Manypenny to H. C. Gilbert, August 14, 1854, LS, March 28-Aug. 26, 1854, M21, Roll 49, RG 75, NA.

[117] Henry C. Gilbert to George W. Manypenny, October 17, 1854, Documents Relating to the Negotiation of Ratified and Unratified Treaties, Ratified Treaties, 1854-1855, T494, Roll 5, RG 75, NA.

Article 1 of the 1854 Treaty stipulated that the "Chippewas of Lake Superior hereby cede to the United States all the lands heretofore owned by them in common with the Chippewas of

Completion of the La Pointe treaty with the Lake Superior Chippewa in September, 1854 was a watershed event for both the Chippewa and the United States. The agreement marked the formal end of removal attempts that had been envisioned since 1837. It also inaugurated the new reservation policy in Wisconsin and Minnesota. Finally, the treaty commissioners' response to their failure to negotiate a cession with both the Mississippi and Lake Superior Chippewa, e.g., proportioning annuities and establishing a territorial boundary, signalled the United States' abandonment of the long-held fiction that the Chippewa could be administered as a "united people."

4.2 The February 22, 1855 Treaty

The events of the summer of 1854 left the Minnesota Chippewa waiting for a treaty negotiation of their own. The need for such a treaty was apparent not only in the reported difficult situation faced by the Chippewa in

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the Mississippi." After describing the cession's borders, Article 1 also marked the Mississippi Chippewas' assent to the cession and their agreement that the "whole amount of the consideration money for the country ceded above, shall be paid to the Chippewas of Lake Superior." In exchange for this, the Lake Superior Chippewas relinquished "to the Chippewas of the Mississippi, all their interest in and claim to the lands heretofore owned by them in common," which lay west of the newly defined boundaries. Article 8 of the 1854 Treaty noted the agreement between the Lake Superior and Mississippi Chippewa, in which "The former shall be entitled to two-thirds, and the latter to one-third, of all benefits to be derived from former treaties existing prior to the year 1847." Kappler, Indian *Affairs*, Vol. II, pp. 648, 650.

obtaining their annuities, but also in the changing demographics of Minnesota Territory. Similar to the rapid population increases that occurred in Michigan between 1830 and 1840 and in Wisconsin after achieving territorial status in 1836 and following the treaties of 1837 and 1842, Minnesota was poised to receive its first wave of European immigration in 1854. In that year, the territorial population was 32,000 residing in 23 counties. A year later (1855) the population had risen a modest 8,000 to 40,000. However, the expectation of dramatic increase in population had prompted the expansion of counties to 32. In 1856, the number of counties had expanded again to 42 and, in 1857, the number stood at 63. Population similarly exploded with estimates of 100,000 in 1856 and more than 150,000 in 1857.[118]

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[118] William Watts Folwell, *A History of Minnesota* (St. Paul: Minnesota Historical Society, 1921), Vol. I, p. 360. Immigration to Minnesota also followed a pattern established in Michigan and Wisconsin. During the early 1850s, the migration of New Englanders, who had pushed into Michigan in the 1830s and Wisconsin in the 1840s, moved farther west to Minnesota Territory. The Densmore family is an example of this migration. Orrin Densmore migrated from New York to Michigan around 1830. Between 1839 and 1845, Orrin Densmore was traveling throughout Michigan and Wisconsin, and by 1852, he had settled in Wisconsin. Railroad speculators for what became the Northwestern Railroad retained Orrin's son, Benjamin, in 1854, to survey lands between the St. Croix and Mississippi Rivers in Minnesota. *Densmore's* hand-drawn maps of the Rum River Valley south of Mille Lacs were prepared around 1855. They demonstrate how numerous economic interests cast covetous eyes on the resources originally ceded to the United States in 1837. See biographical data in the "Guide to The Densmore Collection," Minnesota Historical Society, St. Paul, Minnesota. See also the "Oversize Map Collection" in that same manuscript

Congress recognized the exigency posed by the rapid immigration to Minnesota and passed additional legislation authorizing the Indian Office to extinguish Indian title to remaining lands in Minnesota and Wisconsin in December 1854. Ten thousand dollars was appropriated for the negotiations.[119] A few days following passage of the act, Minnesota Territorial Delegate Henry Rice wrote to Commissioner Manypenny urging him to bring the Mississippi Chippewa leaders Hole-In-The-Day, Flatmouth, and others to Washington to negotiate a treaty. Rice advocated the Washington location for the council not only because it would be expedient, but also because it would allow the Senate to ratify the agreement before the end of the present legislative term.[120] The St. Paul *Daily Democrat* reported the news from Washington noting that "immediate steps will be taken to extinguish the Indian title to these lands." The citizens of Minnesota Territory were to be congratulated "upon the prospect of this treaty," the *Daily Democrat* continued, because the treaty promised to open up the "valuable pine lands upon the upper Mississippi."[121]

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series. For a discussion of this pattern of migration see Richard A. Bartlett's, *The New Country: A Social History Of The American Frontier, 1776-1890,* (New York: Oxford University Press, 1974), pp. 120-122.

[119] Act of December 19, 1854, 33rd Cong. 2nd sess. *Statutes At Large and Treaties of the United States of America* (Boston: Little Brown and Company, 1866). The authorization for the 1855 treaty passed both houses of Congress with no debate.

[120] Henry Rice to George Manypenny, December 17, 1854, LR, Chippewa Agency, 1854-1855, M234, Roll 150, RG 75, NA.

[121] *Daily Democrat,* Dec. 27, 1854, (Vol. 1, no. 203), St. Paul, Minnesota, p. 2.

Commissioner of Indian Affairs George Manypenny responded quickly to calls for a treaty with the Minnesota Chippewa. In January, 1855 he wrote to Territorial Governor and Superintendent of Indian Affairs W. A. Gorman asking him to have Agent D. B. Herriman escort "Hole-in-the-day and six other principal chiefs of the Chippewa Indians of the Mississippi" to Washington, D.C. Adhering to Rice's advice, Manypenny also asked Gorman to have Pillager leader Flatmouth and other chiefs from that band and those near Lake Winnibigoshish brought to the nation's capital if the summons did not delay the Mississippi chiefs' arrival in Washington by February 10.[122]

The Commissioner's insistence on the Chippewa arriving by early February suggests that he hoped to have a treaty ratified by the Senate before that body recessed in March. However, Agent Herriman's adherence to those instructions meant that a number of Mille Lacs Chippewa missed the parties' departure from St. Paul by one day. Governor Gorman informed Manypenny of this situation on February 1, explaining that the Mille Lacs complained to him (Gorman) "that the Indian Mr. Herriman had with him taking to Washington was not a chief." Moreover, with respect to Hole-In-The-Day, these Mille Lacs said that if that Chippewa leader sold Mille Lacs' land he would be killed upon his return.[123] Gorman, recognizing

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[122] George Manypenny to W.A. Gorman, January 4, 1855, LR, Chippewa Agency, 1854-1855, M234, Roll 150, RG 75, NA.

[123] W. A. Gorman to George Manypenny, February 1, 1855, Records of the Minnesota Superintendency, Letters Sent, May 20, 1853-Apr. 11, 1856, M842, Roll 9, RG 75, NA.

that there were legitimate complaints against Agent Herriman and that Commissioner Manypenny wanted as many Chippewa present at the council as could get there by February 10, authorized C. H. Beaulieu to escort the Mille Lacs chiefs eastward.[124]

The two-week negotiating session in the Washington office of George Manypenny was carefully transcribed in a lengthy proceeding. The Mississippi and Pillager Chippewa privately and jointly met with Manypenny in a series of negotiating sessions between February 15 and 22 and again between March 8 and 10. Minnesota Territorial Delegate Henry Rice, was in attendance of many of the sessions, as were a number of current and former traders, such as Clement Beaulieu and Charles Oakes. Rice played a principal role as advisor to the Chippewa and as a liaison with the Senate.[125]

Three principal issues characterized the negotiation: 1] the price to be paid for the remaining Chippewa land in Minnesota, 2] control over money spent for farmers, blacksmiths and teachers, and 3] payment of Chippewa debts to traders. Interestingly, details as to the lands to be reserved for the various bands did not figure prominently in the discussions. Perhaps one explanation for the lack of focus on the reservations was Manypenny's offer early in

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[124] Ibid. See also W. A. Gorman to CIA, February 1, 1855, LR, Chippewa Agency, 1854-1855. M234, Roll 150, RG 75, NA.

[125] "Interview between the Commissioner of Indian Affairs and a Delegation of Chippewas," Ratified Treaty No. 287, T494, Roll 5, RG 75, NA.

the negotiations to have each band define its territory and to select the locations for reservations.[126]

Both Mississippi Chippewa leader Hole-In-The-Day and Pillager Band leader Flatmouth took issue with the Commissioner's initial value of the cession as 3-4 cents per acre. After deliberation and discussions with Henry Rice, representing the Pillager and Lake Winnibigoshish bands, Manypenny counter-offered with a figure closer to 9 cents per acre. Although Manypenny and others suggested that this figure was generous to the Chippewa, it actually may have represented approximately what the Commissioner had intended to pay.[127]

Hole-In-The Day was particularly vocal about the Chippewa desire not to have their payments spent on employing government farmers, blacksmiths and teachers. As Henry Rice explained during the third negotiating session, the Chippewa complained that these government employees were serving the Chippewa selectively, favoring some and not others. The Chippewa, according to Rice, wanted to select their own farmers, teachers and mechanics and to use the portion of the annuities spent on these services as they saw best. The minutes of the negotiation record a great deal of discussion over this issue and reflect Manypenny's skepticism

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[126] Ibid., fr. 334-335, 338, 380-383.

[127] Manypenny initially offered these bands a total payment of $600,000, paid over a 30-year period. The monetary value of the final agreement came to approximately $680,000. Ibid., fr. 339; "Treaty With The Chippewa, 1855," Kappler, *Indian Affairs*, Vol. II, pp. 685-690. [See Figure 1 for the extent of the 1855 cession.]

over Chippewa control of educational funds. However, in the end, the Commissioner was forced to concede some discretionary use of these funds by the Chippewa.[128]

Finally, the issue of trader debts consumed a great deal of discussion, both prior to signing the agreement on February 22 and before the end of the discussion on March 10. Commissioner Manypenny, who was extremely reticent about allowing any government funds ending up in the hands of traders, discussed this issue at great length with all of the Chippewa. Manypenny took the extraordinary step of discussing each debt individually with Hole-In-The-Day and Flatmouth to get their approval before including an aggregate figure in the treaty.[129]

Throughout the two-week negotiation, the Mille Lacs Band representatives were generally silent. Perhaps their mere presence was enough to ensure their acceptance of the treaty. Despite their apparent silence, the Mille Lacs

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[128] Rice also said that the Chippewa wanted to be able to buy and sell their land. In this, he was perhaps a bit self-serving. However, it is clear from the record of the negotiations that Hole-In-The-Day argued strenuously for control of the educational funds and was not entirely pleased with the final clause in the treaty. "Interview between the Commissioner of Indian Affairs and a Delegation of Chippewas," T494, Roll 5, fr. 379-380, 383-389, 390-391, 396; "Treaty With The Chippewa, 1855," Kappler, *Indian Affairs*, Vol. II, p. 688.

[129] "Interview between the Commissioner of Indian Affairs and a Delegation of Chippewas," T494, Roll 5, fr. 403-430. It is interesting to note that at least four individuals present at the negotiations, also were designated to receive specific funds from it: C. H. Beaulieu, Paul Beaulieu, Truman A. Warren, and Charles Oakes.

did achieve an important objective. They secured a reservation on the southern shore of Lake Mille Lacs, within the 1837 ceded territory. The significance of this accomplishment was readily apparent to the Chippewa and to other residents of Minnesota.

5.0 RUM RIVER LOGGING AND THE AGREEMENT WITH THE MILLE LACS, JUNE, 1855

Since 1849, Minnesota lumbermen had cut timber along the Rum River south of Lake Mille Lacs and had used a "splash dam" to store water in the river for the spring drive.[130] The timber cut along the Rum River was taken from private or "University" lands within the 1837 ceded area.[131] Consequently, neither the Chippewa, nor

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[130] Early Minnesota lumberman Daniel Stanchfield claimed that timber had been cut along the Rum River at a much earlier date and used to construct Fort Snelling. Stanchfield explored the river in 1847 and began his cutting in the area in 1848. According to Stanchfield, more than 6 million board feet of timber was cut and floated down the Rum River by 1850. Over 23,000,000 feet were cut in 1853 and 33,000,000 feet in 1854. Daniel Stanchfield, "History Of Pioneer Lumbering On The Upper Mississippi And Its Tributaries, With Biographic Sketches", *Collections of the Minnesota Historical Society*, Vol. IX, (St. Paul: Minnesota Historical Society, 1901), pp. 329-331, 342-343.

[131] Township surveys in the cutover areas were undertaken as early as 1849. By the close of 1851, General Land Office contract surveyors had also conducted a number of subdivisional surveys along the Rum River. For example see, General Land Office Survey Plats for Townships 37N, Range 26W, Township 38N, Range 26W, Township 38N, Range 27W. Records of the Bureau of Land Management, RG 49, Springfield, Virginia.

the United States had any claim to the stumpage. However, the dam at the outlet to the lake, while occupying private land, flooded some of the rice marshes utilized by the Mille Lacs Chippewa.

The problem had apparently been persistent since 1849, but it became more pronounced during the winter of 1855.[132] The Mille Lacs complained about this intrusion on lands that they thought they were reserving by the Washington treaty. The situation became desperate in late February, 1855, when a clash between the lumbermen and the Chippewa resulted in the deaths of one Chippewa and two lumbermen.[133] Governor Gorman immediately dispatched troops from Fort Snelling to the lake to meet with the Mille Lacs Chippewa. After a difficult negotiation, Lieutenant John Hamilton was able to convince the Chippewa to surrender two of three Indians implicated in the incident. The Mille Lacs also allowed for the completion of the dam on terms previously negotiated by Gorman.[134] In return for these concessions, Lieutenant Hamilton agreed not to have the two Chippewa tried before the Mille Lacs chiefs returned from Washington and could make their views known.[135]

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[132] John Hamilton to Lieut. J. Stewart, March 9, 1855, File: "Territorial Governor – Gorman – Letters Received, Indian and Military Affairs, 1853-1857." Minnesota Territorial Archives, MHS, St. Paul, Minnesota.

[133] W. A. Gorman to George Manypenny, February 16, 1855, Records of the Minnesota Superintendency, Letters Sent, May 20, 1853-Apr. 11, 1856, M842, Roll 9, RG 75, NA.

[134] Willis A. *Gorman* to George Manypenny, July 6, 1854, LR, Chippewa Agency, 1854-1855, M234, Roll 150, RG 75, NA.

[135] John Hamilton to Lieut. J. Stewart, March 9, 1855.

Writing to Commissioner Manypenny upon the return of Lieutenant Hamilton, Governor Gorman claimed to have succeeded in containing the situation for the time being.[136] Gorman knew, however, that it was only a brief hiatus in the controversy. In May, a number of lumbermen on the Rum River, claiming a substantial investment in their enterprise, petitioned Governor Gorman to find a permanent solution to the problem.[137] Gorman responded to the request in a number of ways. He dispatched D. B. Herriman to the Mille Lacs to mediate the dispute. At the same time, Gorman admonished the Chippewa to refrain from attacking the dam or the lumbermen. He also sought military protection for the petitioners.[138] Having addressed the immediate problem, Gorman sought the support of the Indian Office in reaching an agreement with the Mille Lacs.[139]

The correspondence surrounding the eventual resolution of the Rum River Dam controversy suggests that the Mille Lacs Chippewa, United States Indian agents, and

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[136] W. A. Gorman to George Manypenny, March 9, 1855, LR, Chippewa Agency, 1854-1855, M234, Roll 150, RG 75, NA.

[137] Petition to Governor Gorman, May 29, 1855, LR, Chippewa Agency, 1854-1855, M234, Roll 150, RG 75, NA.

[138] W. A. Gorman to Little Hill, June 4, 1855; W. A. Gorman to D. B. Herriman, June 5, 1855; Willis A. Gorman to Major Sherman, June 5, 1855, all in Records of Minnesota Superintendency, 1849-1856, M842, Roll 9, RG 75, NA.

[139] "Willis A. Gorman to George Manypenny, June 4, 1855, Records of Minnesota Superintendency, 1849-1856, M842, Roll 9, RG 75, NA.

local non-Indian residents of the area were initially confused about the boundary of the reservation.[140] By late June, it became clear to all parties that the dam had not been constructed on Indian land. The parties also discovered that some of the affected Chippewa rice marshes also were not included within the reservation, despite the Indians' belief that the February treaty had reserved "all of the rice Lakes in the vicinity of said Mille Lacs."[141] Recognizing that flooding from the dam affected Chippewa rice areas both on and off the reservation, Agent Herriman concluded an agreement with the Mille Lacs in late June, 1855. By the terms of the agreement, the Chippewa would receive a payment from the United States of $1,000 per annum for five years in return for the damage done to their rice areas.[142] Governor Gorman later received support for this agreement from the Indian Office, although the Secretary of the Interior objected to the United States' obligation to make the annual payment.[143]

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[140] Governor Gorman had initially believed that the reservation boundary ran through "the *centre of 'Mille Lac,'* but learned later that this was the "*old* line" (1837 ceded territory boundary). Gorman later corrected himself by explaining to Commissioner Manypenny that the "*new* line (the one I intended to have mentioned) passes through only a small portion of the Southern border of Mille Lac." Willis A. Gorman to George Manypenny, June 20, 1855, Records of Minnesota Superintendency, 1849-1856, M842, Roll 9, RG 75, NA.

[141] Agreement with Mille Lacs Chippewa, June 20, 1855, LR, Chippewa Agency, 1854-1855, M234, Roll 150, RG 75, NA.

[142] Ibid.

[143] Charles Mix to Secretary of the Interior R. McClelland, June 30, 1855, *Territorial Papers of the United States,* Minnesota, 1849-1858, M1050, Roll 12, RG 75, NA; R. W. McClelland to Charles E. Mix, July 2, 1855, LR, Chippewa Agency, 1854-1855, M234, Roll 150, RG 75, NA, Charles Mix to R. W. McClelland, July 6, 1855, M1050, Roll 12, RG 75, NA; R. W. McClelland to Charles E. Mix, July 13, 1855, M234, Roll 150, RG 75, NA. Gorman's secretary informed one of the lumberman, Dorilus Morrison, of the Interior Department's decision regarding payment to the Chippewa. Morrison had come to Minnesota in 1854 for the purpose of purchasing pine timber. Morrison also was a proprietor in townsite of Princeton, which was platted at the juncture of the Rum River with its west branch in December, 1855. J. J. McCullough to D. Morrison, July 31, 1855, Records of Minnesota Superintendency, M842, Roll 9, RG 75, NA. See also Stanchfield, "History of Pioneer Lumbering", pp. 358-359; and "Map of Princeton Townsite Platted December 4, 1855," Minnesota Historical Society Manuscript Collections, St. Paul, Minnesota.

The lingering problem between settlers on the Rum River and the Mille Lacs Chippewa during the early 1850s confirms an understanding of the parties to the February 1855 treaty. The incident suggests that there was increasing settlement pressure on the Mille Lacs, dating at least from 1849. Moreover, the controversy documents that the Mille Lacs believed that they had negotiated for a specific reservation at the 1855 treaty council in Washington – one that included some, but apparently not all of their rice marshes. The federal government acknowledged that the timber cutting on the Rum River was legal and that there had been no specific infringement on Indian land or rights. However, federal agents in Minnesota also recognized that, since some reservation land was inundated by the dam, the most expedient resolution

to the immediate problem was to compensate the Chippewa for any loss of their ability to harvest rice in the area.

6.0 CONCLUSION

United States treaty commissioners undertook their negotiations with the Mille Lacs and other Chippewa in 1837 with clearly defined objectives. Following long-standing federal policy, they sought to extinguish Indian title to lands within the cession area, while preparing the Chippewa for eventual relocation to lands west of the Mississippi River. Seeing no immediate need to remove any of the Chippewa from the ceded lands, it was acceptable to the United States to allow these Indians the privilege of hunting, fishing, and gathering on the ceded lands. That this privilege might be revoked by the President was clear to the negotiators and to other observers of the treaty proceedings. It is perhaps one explanation for the Chippewa's misgivings about selling their lands so soon after conclusion of the negotiation.

The Mille Lacs Chippewa. living on the northern border of the 1837 cession were less subject to the call for removal in 1850. Efforts to remove the Lake Superior Chippewa to Minnesota between 1850 and 1851 affected the Mille Lacs only tangentially. Similarly, the temporary suspension of removal of these bands resulting from the opposition of traders, Indians and missionaries had little impact on the Mille Lacs. There is no contemporaneous historical evidence, however, of a revocation of the February, 1850 executive order, with respect to Mille Lacs hunting and fishing privileges in the 1837 ceded area.

Timber harvesting along the Rum River after 1848, events in 1850 and 1852, and the threat of impending immigration to Minnesota Territory, prompted the federal government and the Mille Lacs Chippewa to secure a future for these Chippewa in Minnesota. By obtaining a reservation at the southern end of Mille Lacs, the Chippewa were able to retain a presence in their traditional territory. At the same time, the United States was able to obtain a certainty that the lands outside of the reservation were free from all encumbrances and available to be disposed of as other public domain lands. It was a solution that served the interests of both parties.

Cleland Direct (Excerpts)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

(Caption Omitted In Printing)

* * *

[I-64] how that would have been understood by them.

Q. Is there any indication that the Chippewas were told at some time during the course of the treaty negotiations that the President could cancel this guarantee of hunting, fishing, and gathering at any time he wanted to and for any reason he wanted to?

A. No, they were not told that. In fact, I think such a conclusion would be just the opposite, that they would expect, from the relationship that they had with the Great Father, which I think is more of a nurturing relationship, a mutual alliance between the two people, and they would have seen the Great Father, if anything, as being a protector of their ability to use these resources.

Q. Was there anything at the time in the Chippewas' own political life and political arrangements which would give them an understanding of the authority of a government official to act in this manner, to cancel rights or adjust rights unilaterally?

A. In Chippewa political life, the Chippewa did not delegate authority. They did not delegate any authority – that is, the authority of a husband over a wife, of mothers over children. No individuals made decisions for any other individuals.

Within Chippewa society, decisions, all decisions, were made by discussion and consensus. And, therefore, I don't [I-65] think the Chippewa could have understood this language to give any authority to the President to sort of unilaterally take any action at all.

Q. How did this language, "during the pleasure of the President," fit with the type of relationship they thought they had with the United States?

A. Well, they thought that as long as they conducted themselves peacefully, as long as they took their end of the bargain, as long as they produced fur and articulated with the American economy, did not cause difficulties, that the Great Father and the United States government would likewise support them. As I've said before, the Great Father relationship embodied this mutual support idea.

Q. In your opinion, would the Chippewa have agreed to a treaty, if they understood this, which allowed the United States to control their hunting, fishing, and gathering activities?

A. I don't believe that they would have agreed to that, because, after all, these people were hunters and gatherers. This is the central point here, that the way in which they were organized, the activities they undertook, what they did, how they interacted with each other, what they talked about, all related to hunting and gathering.

That was how they made their living. It was the core of their existence. And I could not believe that they would have [I-66] simply given over control over that to

some figure, however remote, however powerful, however distant.

Q. Professor Cleland, let's turn to another aspect of the 1837 treaty that's at issue in this case, and that's the question of removal. In your opinion, did the Chippewa understand the treaty to mean that they could be ordered to remove or that they had agreed to remove from the territory they were ceding?

A. There's not one mention of removal in any of the documents that surround this treaty. There's nothing in the treaty itself, there's nothing in the instructions for the treaty, there's nothing in the many reports and letters that were written before and after the treaty that relates to removal. This treaty has nothing to do with removal.

Q. In your opinion, how would the Chippewa – and I'm interested in the Mille Lacs Band in particular – have reacted to the prospect of removal in 1837?

A. Well, we have to remember that the Mille Lacs occupied very coveted territory, a territory that was rich in fish and rice, and it was, perhaps we could say, easy living country. It was country that they had taken in hard battle from the Dakota, or the Sioux. And I cannot imagine that they would have easily wanted to give that territory up.

Q. How would an order for removal fit with the relationship you've described that the Chippewa understood they had with [I-67] the United States?

A. I think it is totally inconsistent with that relationship. As I said, I think the relationship was one in which

the United States, through the Great Father, was a benefactor.

Q. Did you find anything in the work you did in preparing your report in which the Chippewa indicated how they felt about removal?

A. Well, in the 1842 treaty, in the course of negotiation of the 1842 treaty, where there is a removal provision, yes, the Chippewa were approached to remove and agreed to – or at least there is a discussion in the treaty documents about removal. And in that situation, the Chippewa reacted with abhorrence.

They were reacting with chagrin that they might at some time have to remove, and they sought from Robert Stuart, who was negotiating for the United States, assurances that they would not have to remove for many, many years, sometime into the distant future. So when they were actually approached by the problem, they reacted very noticeably.

Q. Going back to the 1837 negotiations, there's a statement in the journal where Governor Dodge says that it will be many years before the Great Father will want all of these lands for his white children. Would the Chippewa have understood that to indicate that they would be ordered to remove at some [I-68] point?

A. I don't think they would. I think they would have understood that there would be American settlers coming into the cession, that those settlers would be using the resources. But I think that they would have thought in that day and age that this was compatible, that their activities were compatible.

Q. Let's stay with the removal question, but let's turn to the issue of what the government was intending here. In your opinion, was it the government's intent to provide for the removal of the Chippewa from this territory ceded in the 1837 treaty or secure their agreement to remove?

A. No. This was not a removal treaty, contains no removal provisions, and removal was not discussed with them. It was not the intention of the government to remove the Chippewa from this cession.

Q. Let's discuss some of the key players that were involved, beginning with the Commissioner of Indian Affairs at the time, Carey Harris. I take it you're saying that Commissioner Harris didn't intend this to be a removal treaty, is that correct?

A. That's correct.

Q. And what do you base that on?

A. Well, Carey Harris was a protege of Lewis Cass as well as Andrew Jackson, who was the architect of the Indian removal [I-69] policy, and a removal policy which took place pursuant to the 1830 Removal Act. Carey Harris had been involved, in the years preceding the 1837 treaty, had been involved with the Cherokee removal, with the Seminole removal, with the Creek removal, and with the Chickasaw removal.

This was a man that removed about 50,000 Indians from the eastern portion of North America west of the Mississippi River. Carey Harris knew how to remove Indians. He was a tough enforcer. He said that he would send troops to remove the Chickasaw and that he would

withhold annuity payments and provisioning to remove the Chickasaw.

Now, here's a man that writes instructions for the 1837 treaty. Not only does he not mention removal, he says he can't even think of an example of a treaty for Governor Dodge to use in writing this treaty with the Chippewa. So it's not a removal treaty.

Q. Isn't there some discussion in those instructions about removal of Ottawa and Chippewa Indians?

A. Yes. The instructions ask Governor Dodge to informally ascertain whether or not the Chippewa of Wisconsin would be willing to accept among their midst Chippewa and Ottawa Indians from Michigan. So if Carey Harris and Governor Dodge were thinking about removing Indians, it was to Wisconsin, not out of Wisconsin.

Q. Now, I take it that it's also your opinion that Governor [I-70] Dodge didn't view this treaty as a removal treaty?

A. That's correct. Governor Dodge himself had removal experience. He had earlier recommended the removal of the Menominee, he had recommended the removal of the Winnebago, both from Wisconsin. He was a witness to the 1832 Winnebago removal treaty.

And in those treaties he learned about the methods of removal, and certainly he would have been capable of incorporating those into the 1837 treaty if he wanted to do it. But here, again, we see that there is no removal provisions of any kind in the 1837 treaty.

Q. Did Governor Dodge and Commissioner Harris, in the way they put this treaty together, anticipate that the Chippewa would remain in the ceded territory?

A. They did. In fact, the treaty instructions, as well as the treaty itself, and documents related to payments of annuities and services, prescribe that those annuities and services be provided in the Chippewas' own country – that is, within the cession. So there was a plan here in order to provision Indians and supply Indians with service right where they were.

Q. How do you reconcile the view that there was no intent to provide for removal in this treaty with the existence of this removal policy, removal of 50,000 Indians, as you said, from the east to lands west of the Mississippi.

[I-71] A. Well, you have to understand removal in its broader perspective here. The purpose of the removal was to exchange rich agricultural lands in eastern North America for lands west of the Mississippi River – that is, to free up land which the United States could sell to settlers.

And in areas where Indians were occupying these coveted agricultural lands, in fact, that's what happened. All of the Indians of the southeast through the prairie regions of Ohio, Indiana, Illinois – in fact, into southern Michigan and southern Wisconsin – we see Indian people removed west.

Those treaties were written as removal treaties, and they had provisions, as I said, pursuant to the Indian

Removal Act. That is, they prescribed a date certain for removal, a destination, a method of transportation.

These treaties provided for the evaluation of improvements to the land and a method of payment. They provided for the payment of annuities under former treaties in the place to which they would be removed. And they were all pretty much consistent in that way.

Now, north of these coveted agricultural lands, there were some lands which, in 1836-'37, it was thought that settlers would come in and be taking up residence there and building farms, and so forth, but these lands were not as productive as those farther south. And with those Indians – for example, the Ottawa and Chippewa of Michigan in the treaty [I-72] of '36 or the Menominee in Wisconsin, for example – there were tentative removal treaties written in which it would say something like, when the Indians desire it, they will remove west of the Mississippi River, or some unspecified location usually.

And so it was foreseen that perhaps in the longer run that Indian people would be removed from these marginal agricultural lands.

To the north of that, however, there's an entirely different situation yet again. And now we're talking about northern Michigan, northern Wisconsin, northern Minnesota.

There, where the American officials knew very well there was very low potential for agriculture, and there still is low potential for agriculture, in those regions there was no reason to remove Indians. The reason the United States wanted cessions there was for the timber wealth,

for the mineral wealth, for the fisheries, for other natural resources which the United States could acquire for its citizens.

At the time, there was no idea that farmers were going to be moving in and taking up residence in this north country. Furthermore, it might be said that Indians were integral and vital to the economy in these regions.

These were the people that were producing rice, maple sugar, fish, and other commodities which were important in the economy of the times and the market of the times. These were [I-73] people that the miners and lumbermen, and particularly the fur traders, wanted to keep producing, and they reacted later with outrage when it was learned that the government wanted to remove the Chippewa from this territory.

But most important of all, perhaps, at this time were the treaties themselves, which produced an enormous amount of money, which, in fact, was itself a very important part of the economy of the north country.

Q. Let's move from the 1837 treaty. In your report you have a discussion of treaties negotiated with the Chippewa in 1842. In your view, does the 1842 treaty shed any light on either the intentions or the understandings of the parties to the 1837 treaty?

A. It does. The first thing it shows is that five years after the 1837 treaty that the United States had no long- or short-term plans to remove the Chippewa. Although Robert Stuart was instructed to put a removal provision in the treaty, that is, when the President required them to remove, that they would, and they agreed to do that.

The Chippewa themselves, as I described earlier, reacted with shock when this was brought up. And they received assurances from Robert Stuart that any removal would take place far, far into the future.

Now, the fact, I think, that Robert Stuart was able to give the Chippewa those reassurances again sort of doubly

* * *

[I-80] Honor. Would it be okay for Professor Cleland to refer to these maps briefly in these next questions?

THE COURT: Yes. There's a pointer there.

BY MR. SLONIM:

Q. Professor Cleland, when the removal order directed to the Chippewa was issued in 1850, was the 1837 ceded territory settled by whites to any significant degree?

A. No, it was not. If I could step down, this is a map drawn from the work of Robert Ossinger (phonetic), cultural geographer at the University of Wisconsin-Madison, who has studied the progress of American settlement in the Upper Midwest.

And this map shows that by the standard of two American settlers per square mile, which was the standard long used by American demographers and cultural geographers as a definition for settlement, we can see that here, by 1830, by those standards, there was only settlement down here near Peoria in Illinois and practically no settlement north of there to speak of, although

there were, perhaps, around Green Bay, Wisconsin enough settlers to satisfy that definition.

Then, by 1840, we see that the settlement frontier had reached the very extreme southern part of Wisconsin, Illinois, and then on into the eastern portions of Iowa.

In 1850, the time of the question here, we see that there were only small American settlements here along the Wisconsin [I-81] River – these were associated with lumbering activities – and also in the St. Paul, Stillwater area. (Indicating) All of this country was a virtual wilderness in 1850.

There were, perhaps, I would say, between 800 or 900 non-Indians in this whole territory. And those people were situated in scattered lumber camps through the territory.

Q. Given that situation with respect to settlement, in your view, were settlement pressures the reason the 1850 removal order was issued?

A. No. There was absolutely no settlement pressure in this region.

Q. Well, what did lead to the removal order?

A. Well, the removal order was a continuation – or the pressures which led to the removal order was a continuation of those same things that I talked about earlier relating to various trade interests.

Now, however, in 1850, we see a new Whig administration coming into power in Washington and a new governor, Alexander Ramsey, appointed to the Minnesota

territory. Alexander Ramsey was interested in stimulating the trade and business in Minnesota.

In fact, it was explained to him explicitly, in a letter by Henry Rice, how the Minnesota territory and the business interests would profit by diverting the trade from Detroit and Lake Superior to the Mississippi region.

[I-82] And so the impetus for the removal order had to do with this continuing effort to draw Indians and Indian business west to the Mississippi River.

Q. Did you find any evidence that the removal order was prompted by some action of the Mille Lacs Band?

A. There was no action of the Mille Lacs Band involved here at all in any way. In fact, in 1850, Governor Ramsey himself noted the remoteness of the Mille Lacs, who he said were 40 to 50 miles distant from the Mississippi. And he also noted the rich rice and fish resources of that locality.

Q. Where, with respect to Mille Lacs Lake, did the Chippewa bands that were residing in the vicinity, where did they have their villages and their gardens?

A. They had been always located on the south side of Mille Lacs Lake.

Q. And was that within the territory that had been ceded in 1837?

A. Yes, it was.

Q. After the removal order was issued, what did the government do to remove the Mille Lacs Band from that territory?

A. Absolutely nothing. The government never took any action to remove the Mille Lacs. In fact, during the height of the removal era, Governor Ramsey himself suggested putting a government farmer at Mille Lacs. And, in fact, during the [I-83] removal effort, other Indians from the east, particularly the St. Croix, it was suggested that they could be removed to Mille Lacs.

Q. And where would you expect they would settle at Mille Lacs? What part of the lake would they put their villages at?

A. They would have settled at the south end, too, I'm sure, because it was there that the smaller rice lakes that the Chippewa depended upon for the rice harvest were located.

Q. In the materials you reviewed, did you find any suggestion by government officials of any reason for revoking the Chippewas' hunting, fishing, and gathering rights apart from the effort to remove them?

A. No. I think the attempt to revoke hunting, fishing, and gathering rights was nothing more than insidious effort in order to force these people to remove.

Q. Did the government ever attempt to enforce the revocation of hunting, fishing, and gathering rights?

A. To my knowledge, it never did. To do so would have been to starve the Chippewa, and they just didn't ever try to do that.

Q. Was there a time when the removal order was suspended?

A. Yes.

Q. And could you just briefly describe what happened?

A. Well, on the heels of the Sandy Lake incident, through which there was a scheme hatched by Removal Agent Watrous and [I-84] Governor Ramsey to lure the Chippewa west to Sandy Lake for payment, in which perhaps a quarter of their hunters, or a third of their hunters, died as a result of this effort – given the furor over that; given the fact that the residents along the shore of Lake Superior, that is, the miners and the lumber interests, wrote petitions to the government, to the President, complaining about the removal of the Chippewa; given the fact that the mission establishment was dead set against removal; the Wisconsin legislature petitioned against removal; newspapers were critical of removal in the Lake Superior country and revealed it to be an attempt by the traders to remove Wisconsin Indians to Minnesota – given all those things – and then Agent Watrous wrote to his superior suggesting that the Chippewa had dug in their heels to the point where he was going to need troops to accomplish removal – given all those things, the Secretary of the Interior ordered that the removal be suspended so that the President have time to give it further consideration.

Q. Is there any evidence that the President made a decision to resume the removal effort subsequent to that?

A. There is no evidence that it was ever resumed.

Q. What did the government do at that point? What developed next in terms of efforts to remove the Chippewa?

A. Well, Watrous continued for some time to – he just ignored the removal order, and he continued to plan for [I-85] removal. So that was going on. Otherwise, the government simply did nothing about the removal order.

But in 1854 and in 1855, 1854 particularly, the whole removal effort was repudiated, and that was done through Article XI of the 1854 treaty. That is the article which provides hunting, fishing, and gathering rights on the ceded territory.

And that article also says that the Chippewa would not thereafter be removed from the country set aside for them. And this is a reference to the reservations which were scattered throughout the territory ceded in '37 and '42 and in '54.

Q. At the beginning of your answer, you said Watrous ignored the removal order. I take it you meant that he ignored the suspension order?

A. Yes, I'm sorry.

Q. And then you mentioned that the 1854 treaty provided for hunting and fishing and gathering rights. Where were those provided?

A. Those were provided in the area west of Lake Superior that was ceded in the 1854 treaty.

Q. Had the creation or establishment of reservations previously been viewed as a way of dealing with problems from the 1837 and 1842 treaties?

A. Well, the Chippewa certainly saw it that way. Soon after [I-86] the '37 treaty, Chief Buffalo wrote a letter and said, "Where will my children go?" And in that letter

he asks for a reservation; he asked for, in fact, a two-square-mile reservation.

At the time the '42 treaty was being signed, White Crow, the Lac Courte Oreilles chief, said, could you give us reservations, because they knew that they were under an agreement to remove. And Robert Stuart said he couldn't do that at this time.

In the years following the '42 treaty, a group of Chippewa went to Washington, and they described their 24 villages, I believe, that were scattered through the territory. And they again asked for reservations.

So, in their minds, I think, reservations were related to stability on the land related to their land tenure.

Q. Did the Chippewa ever indicate that they viewed those reservations as a substitute for hunting and fishing rights in the ceded territories?

A. They did not. Those reservations, I think, the Chippewa knew, I'm sure the Chippewa knew, and I'm sure the government knew, could not support the Chippewa that were going to live on them. They were tiny postage stamps of land, and these were people that needed the support of resources that were scattered over vast territory.

So it was always the understanding that these people [I-87] would continue to hunt, fish, and gather, using these reservations, perhaps, as a residential base during some portion of the year, at least.

Q. Did the government express any views – when the reservations were created in the 1854 treaty, did the

government express any views as to whether the reservations would be a substitute for hunting and fishing and gathering throughout the larger areas that had been ceded?

A. Henry Gilbert explained to the Chippewa, in the context of the 1854 treaty negotiations, that the reservations were not meant to confine the Chippewa. In fact, he told them that they could go off the reservations for hunting when they had a mind.

So I don't think anybody ever conceived of these little reservations as areas which would support people as hunters, fishers, and gatherers.

Q. Did anyone, either government officials or others, express any views as to whether the Mille Lacs Chippewa retained their hunting, fishing, and gathering privileges under the 1837 treaty as of 1855?

A. Yes. In February of 1855, Governor Gorman wrote to the Mille Lacs Chippewa in the context of a dispute over a lumbering dam. He said that the Chippewa no longer had any rights in the 1837 ceded territory except for hunting, fishing, and gathering.

[I-88] In March, I believe, of 1855, Lieutenant Hamilton, also involved in the investigation of this dam dispute at Mille Lacs, wrote that he didn't have a copy of the treaty with him and that he did not feel justified in asking the Chippewa to relinquish rights which they had never ceded by treaty.

Gorman again wrote to the Chief Little Hill, expressing a similar view that he had made earlier, that is, that

these rights still existed within the 1837 area. And that was in June of 1855.

Q. In Lieutenant Hamilton's letter, which treaty was he referring to when he said he didn't have a copy of the treaty?

A. He was referring to the treaty of 1837.

Q. And did he indicate whether either the lumbermen or the Mille Lacs Chippewa had any views as to whether that treaty protected their rice harvesting and their rice crops?

A. He said both the Chippewa and the lumbermen were under the impression that that was so.

THE COURT: We'll recess until 1:30.

(Noon recess taken)

[I-89] Afternoon Session
June 13, 1994
1:30 o'clock p.m.

(Appearances as heretofore noted.)

THE COURT: Mr. Slonim?

MR. SLONIM: Thank you, Your Honor.

CHARLES CLELAND,

resumed the witness stand and testified further as follows:

DIRECT EXAMINATION (Cont'd)

BY MR. SLONIM:

Q. Professor Cleland, I'd like to turn to the 1854 and 1855 treaties that are discussed in your reports. In your opinion, was the 1855 treaty related in some way to the 1854 treaty?

A. Yes. These treaties were companion treaties. The main object of the 1854 treaty was to acquire all remaining Chippewa land of Minnesota, Wisconsin and elsewhere, and that mission was not accomplished in the '54 treaty. So the '55 treaty was, in that sense, supplementary to the '54 treaty.

Q. Hadn't the land in Wisconsin previously been acquired?

A. Yes, all except a small strip along the Wisconsin border, which had, through a surveying error, not been ceded. So that was a detail that could be taken care of by this treaty arrangement.

Q. Apart from acquiring additional Chippewa lands, what were the government's objectives or policies at the time these [I-90] treaties were made?

A. The secondary – well, perhaps I shouldn't say secondary – but another objective in these treaties was establishing the reservation policy that Manypenny had designed as Commissioner of Indian Affairs. His main objective was to establish reservations within ceded territories.

These reservations could then be allotted to individual Indians, allotted in severalty, and this process would

then promote agriculture, farming, and the civilization of Indians throughout the United States. The reservations would also protect Indians from outside influences and also provide an efficient way to provide services and annuities to those Indians.

Q. At this time, was part of the reservation policy the confinement of Indians on the reservations?

A. No. There was never any indication in Manypenny's plans to confine Indians to the reservation. These were home bases, so to speak, from which Indians could freely range in pursuit of their various activities.

Q. Did you find any intent, in looking at correspondence or instructions leading up to these treaties, of an intent to cancel hunting and fishing rights under prior treaties as part of these treaties?

A. No. Manypenny was very well aware of the details of the [I-91] Chippewa cessions in Wisconsin and Minnesota to date. He suggested many revisions of these treaties in order to adjust, for example, treaty payments and services under those form of treaties. But he did not, in any of these instructions, mention hunting, fishing, and gathering.

Q. Now, you previously mentioned that the 1854 treaty extended hunting and fishing rights to the territory that was ceded in that treaty. Did you find any indication that either Manypenny or Gilbert had any concerns about that provision of the 1854 treaty?

A. No concerns were expressed by either.

Q. Were there similar provisions in other treaties that were negotiated while Commissioner Manypenny was in office?

A. There were. Other Manypenny treaties, in fact, did have hunting, fishing, and gathering provisions.

Q. Did you find any Manypenny treaty that cancelled hunting and fishing rights?

A. There's one that I know about. And that is the treaty of August 1, 1855 in which the Chippewa at Sault Ste. Marie, in regard to that band, Manypenny treated with them in order to cancel fishing rights, which had been a privilege of a treaty that was negotiated in 1820.

The circumstances there were that the Sault Ste. Marie Canal Company had destroyed the fishing ground in the construction of the canal and lock system through the St. [I-92] Mary's River. And so this treaty dealt with that issue.

Q. Was the language of cancellation there explicit with respect to the fishing rights?

A. Yes, it was.

Q. And was there a provision in that treaty to provide compensation for the cancellation of the fishing rights?

A. There was.

Q. Did you find any circumstances similar to what was occurring in the Sault Ste. Marie situation in connection with the territory that had been ceded in 1837 or 1842 which might have led the government to want to cancel hunting and fishing rights in those areas?

A. No similar circumstances, no.

Q. Did you find any indication that Manypenny's objectives in the Chippewa treaties changed from the time the 1854 treaty was negotiated until the negotiation of the 1855 treaty?

A. None that I'm aware of.

Q. If Commissioner Manypenny had wanted to cancel the hunting and fishing rights, the guarantee of the hunting and fishing and gathering which was found in the 1837 treaty, could he have accomplished that purpose at the 1855 treaty?

A. No, for the simple reason that the parties to the 1837 treaty, or most of the parties, were not present at the 1855 treaty. That is, all of the interior and lakeshore Chippewa were not present.

[I-93] Q. In other words, the bands in Wisconsin?

A. Yes.

Q. In your opinion, on the basis of all the materials you've reviewed, was it the government's intent to extinguish the Chippewas' guarantee of hunting, fishing, and gathering rights under the 1837 treaty in the 1855 treaty?

A. In my opinion, the 1855 treaty has nothing whatsoever to do with hunting, fishing, and gathering rights in the 1837 cession.

Q. Is there any evidence that the Chippewa who were parties to the 1855 treaty were ever told, either before or during the treaty negotiations, that the treaty would affect their rights to hunt, fish, and gather under the 1837 treaty?

A. There is no evidence in the correspondence leading up to the treaty, there is no evidence in the treaty journal, and there's no evidence later that I'm aware of that this subject was ever discussed with the Chippewa.

Q. In your opinion, what was the government's purpose in Article I of the 1855 treaty?

A. The government's purpose was to acquire land in northern Minnesota, Chippewa land in northern Minnesota.

Q. Well, didn't the government know precisely where those land claims were?

A. No, they did not. They knew that there were Chippewa land claims to the north and west. Manypenny tried to find [I-94] out during the negotiation of the 1855 treaty, but the Chippewa parties to the negotiations were vague. They would not define what their claims were.

Q. What information did Manypenny have about the extent of their claims, or potential claims?

A. Well, he had an annual report from Alexander Ramsey in 1850, in which Alexander Ramsey noted that Chippewa land claims extended west of the Red River Valley and that they claimed that land by right of conquest and actual possession. Likewise, Henry Rice wrote shortly before the treaty to Manypenny, saying the same thing.

Q. In Ramsey's 1850 annual report which you referred to, did he identify which bands of Chippewa were asserting claims west of the Red River?

A. He said that the Pillager had made those claims, for one, and I'm sure that he knew that there were other claims there as well.

Q. Did Commissioner Manypenny have any maps to use that indicated where these claims might be?

A. Yes. There's a map that is shown here in this exhibit, which was the map that was drawn up for the 1847 treaty and then forwarded to Henry Gilbert to use in the 1854 treaty. And if I could – Your Honor, could I? –

THE COURT: Yes.

A. (Continuing) There is a line on this map, this line [I-95] (indicating), which, in the index to the map, says is the easternmost claim of the Pillager Chippewa. So their claim was out in this territory here (indicating).

MR. SLONIM: Your Honor, when we offer exhibits, we will be offering that map as Exhibit 179 – not that version; we have photographs of the map that we'll be offering.

BY MR. SLONIM:

Q. Apart from the extent of these claims, was the nature of these claims clear to Commissioner Manypenny?

A. By "nature," you mean what exactly?

Q. The basis for these claims. Were they based on prior treaties? What was the basis for these land claims?

A. The land claims were based upon the Sioux/Chippewa warfare. And he knew that this warfare had

extended to the Red River Valley and beyond, so that these claims were by rite of conquest.

Q. Where were these claims in relationship to the line that had been drawn at the Prairie du Chien treaty?

A. The Prairie du Chien line does not extend into that territory. So they were well to the north and the west of the end of the Prairie du Chien line.

Q. How did Commissioner Manypenny deal with these uncertainties about the extent of these claims and the nature of the claims?

A. He dealt with them in the second sentence of Article I of [I-96] the 1855 treaty. And in that sentence he provided a general release clause for these unspecified claims to the north and west.

The first release clause in that article deals with the land that was actually ceded. And then the next sentence deals with these unspecified, unknown claims out in the north and western portion of Minnesota and beyond.

Q. Did Commissioner Manypenny ever explain this, that this was what he was doing in Article I of the treaty?

A. No, he never explained this to the Chippewa.

Q. Did he ever explain it in any written form to anybody else?

A. Yes. In fact, the day after the treaty was concluded, on February 23rd, he wrote a letter to Secretary McClelland, in which he specifically states that this language relates to land claims, unspecified land claims, to the north and west.

Q. Does that letter describe the other provisions of the 1855 treaty and what their effect would be?

A. Would what?

Q. Does the February 23rd letter that you've referred to, does that, in addition to talking about Article I, does it talk about the other articles of the treaty?

A. Yes. It explains the treaty.

Q. Is there any mention in that letter of cancelling hunting and fishing rights?

[I-97] A. There is no mention of that at all.

Q. Professor Cleland, in your opinion, did the Chippewa intend or understand that the 1855 treaty would relinquish their hunting, fishing, and gathering rights under the 1837 treaty?

A. In my view, they had no understanding that the 1855 treaty had anything to do with hunting, fishing, and gathering rights anywhere.

Q. I'd like you to refer to the other map exhibit you've brought here. The question is, what had the Chippewa learned from prior treaties about land cessions and hunting and fishing rights?

A. In this exhibit, I have a base map of Wisconsin and Minnesota. This first overlay shows the Prairie du Chien line of 1825. It shows it extending here to the juncture of the Buffalo and the Red River.

Then, following that, we have the treaty of 1837, which is shown here (indicating). That treaty, of course,

was a treaty in which hunting, fishing, and gathering rights were reserved.

Then there was the 1842 treaty, in which they ceded the Lake Superior shore. In that case, hunting, fishing, and gathering rights were reserved.

Then two small parcels of land were ceded in 1847 for the purpose of housing immigrant Winnebago and Menominee people.

[I-98] Then in 1854, this territory (indicating) was ceded. And when this territory was ceded, hunting and fishing and gathering rights were provided in that treaty.

Q. And did the Chippewa at that point have reason to expect that a further land cession would affect hunting, fishing, and gathering rights?

A. They had no reason to think so, no.

Q. During the negotiation of the 1855 treaty, there was a reference to a map that was apparently present at the negotiating room. Could you explain what was said about the map and what significance it has?

A. Apparently a map that was very much like this one, showing the previous cessions, was on display. And when Hole-in-the-Day came into the room, or early on, he pointed to this line – that is, the western line of the 1854 cession, and he remarked in a rather offhanded way, "Well, I was partially responsible for having these cessions plotted down on the map."

And so the map that they must have been looking at when they were talking about the 1855 cession was something like that. In other words, this (indicating) was the

land that they were talking about. And that land, or some of that land, was subsequently ceded in the '55 treaty, which then would look something like that.

Q. And what about the rest of the land that's not within [I-99] that boundary?

A. This was not within the cession, but was ceded in later times.

Q. And is that the land you were talking about with respect to the second sentence of Article I of the treaty?

A. That's the land, yes.

Q. And who ceded it in later times?

A. It was ceded by Red Lake people and other Chippewa up in that section of Minnesota.

Q. Not the bands that had been parties to the 1855 treaty?

A. No, not those Chippewa.

Q. Had hunting, fishing, and gathering diminished in importance to the Chippewa by 1855?

A. Not at all. It was as important as it ever was because of the fact that these people still made their living, they still subsisted, by hunting and gathering and fishing over the ceded territory. It was still the only way that they could live, and it continued to be a very important aspect, not just for subsistence, but also in the whole identity of Chippewa culture.

Q. In your opinion, could the Chippewa have survived in 1855, or in the foreseeable future, without hunting, fishing, and gathering off of the reservations that were created by the 1855 treaty?

A. There would have been simply no way for them to do that.

[I-100] Q. Professor Cleland, in Article IX of the 1855 treaty, there's a provision which says that the Chippewa agreed to "settle down in the peaceful pursuits of life, to commence the cultivation of the soil, and appropriate their means to the erection of houses, opening farms, and education of their children, and such other objects of improvement and convenience, as are incident to well-regulated society."

How, in your opinion, would the Chippewa have understood that provision?

A. Well, first, that's pretty standard Manypenny phraseology. It appears in a whole variety of treaties, and in nearly identical form to that. These reflect the ideals that Manypenny saw well into the future in which he foresaw a time when the Chippewa and other native peoples would be civilized, in his definition.

So these were future goals that were provided. And I might also point out that there's nothing in those things that is in any way contrary to the continued hunting, fishing, and gathering of the Chippewa.

These reservations protected their core village areas, and they likely saw a time when their lives would change and they would be living there, perhaps even doing more

cultivation. But they would continue as best they could to make a living from the land.

Q. Isn't it correct that at various times in the 19th [I-101] century, before as well as after the 1855 treaty, that various Chippewa bands expressed interest in getting assistance from the United States with farming or gardening?

A. They did. These people did, of course, since aboriginal times, plant corn, beans and squash and other garden products. This was part of their whole subsistence cycle. As I've noted, in the north country, it wasn't perhaps a very important one, but it was important enough that they continued to pursue it.

It did produce a storable commodity, which was important in their annual cycle with other commodities as well. So this is something that they were willing to do and willing to devote some energy to.

Q. And do you believe statements that are attributed to the Chippewa, requesting additional assistance with the desire to have more productive gardens or farms, indicate an intent to abandon other aspects of their seasonal life, such as hunting and fishing and gathering?

A. No, I don't believe that's so.

Q. Was there any indication in the treaty journal that Commissioner Manypenny thought that the Chippewa would continue to hunt and trap, and so on?

A. Yes. At one point, he even admonished them not to get into debt to traders and to continue to pursue their trapping activities, and so forth. I think he quite clearly

understood [I-102] that that's what they would be doing in the foreseeable future.

Q. Was there some discussion during the treaty council of payment of debts to the traders?

A. There was discussion that I would think indicates the importance of the relationship between the Chippewa and their traders. This was a major point of access for the Chippewa to acquire manufactured goods and other commodities.

And I think they wanted to maintain those good relationships. One thing they knew that they had to do to do that was to pay their debts to the traders, which were always accumulating.

Q. Was there also some discussion in the treaty journal about the timing of annuity payments that would be made by the government to the Chippewa?

A. Yes. As in the case of the 1837 treaty, the 1842 treaty, the 1854 treaty, there were always conflicts between when the government wanted to provide these annuities, that is, to require all the Chippewa to come to one place, and with their other activities. And this was a particularly difficult point for people who depended upon wild rice, which was harvested in August generally, which was the time usually when the government wanted to pay the annuities.

So very often annuity payments interfered with harvesting of rice, harvesting of gardens, harvesting of the fall [I-103] fishery. It was a constant problem, and it was here, as several of the chiefs expressed to Manypenny in the course of the '55 treaty discussions, and later on. In

fact, in 1861 there were a barrage of complaints about those payments and their timing.

Q. In your opinion, Professor Cleland, do the actions of the Chippewa subsequent to the 1855 treaty suggest anything about their understanding of their hunting, fishing, and gathering rights after that treaty was made?

A. They continued after the treaty through the 19th century, in fact into the early 20th century, to continue to pursue hunting, fishing, and gathering throughout the ceded territory.

Q. And do you think that says anything about what their understanding was about their treaty rights at the 1855 treaty?

A. Well, I know that later on in the century, when they were arrested for pursuing these activities, that they frequently claimed these rights under treaties.

MR. SLONIM: Judge Murphy, I have no further questions for this witness at this time. I'd like to reserve the right to recall him as a rebuttal witness, and also – I hope this won't be necessary – but in case there is a problem with some documents that we need to lay foundation for. But, with those two caveats, I have no further questions.

* * *

Cleland Cross (Excerpts)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

(Caption Omitted In Printing)

* * *

[I-107] provide the U. S. government with title to the lands that the Ojibwe had occupied within that area?

A. Well, if I may, first, I don't agree with the premise of your question, that the removal policy lasted from the '30s to the '50s, because of the fact that by the '30s or the early '40s, I think it was very clear to the government that the removal policy was not working.

It was not something that persisted at that length of time, for the simple reason they didn't have anyplace to remove people to, because the areas in the trans-Mississippi west were filling up with settlers.

Q. You would agree, though, wouldn't you, Dr. Cleland, that for the first part of that century, the basis of the federal policy was to remove Indians west of the Mississippi?

A. Yes, I would agree to that.

Q. Thank you. I'd like you to refer now to Exhibit D-9 in the notebook that's there.

A. Yes.

Q. And in the first paragraph of that exhibit, there's a statement from the President of the United States, is that right?

A. Yes, from Andrew Jackson.

Q. And could you just read into the record the first paragraph of what Mr. Jackson is saying to Congress there?

A. This is to the Senate and House of Representatives on the [I-108] 15th of February, 1832. "Being more and more convinced that the destiny of the Indians within the settled portion of the United States, depends upon their entire and speedy migration to the country west of the Mississippi, set apart for their permanent residence, I am anxious that all the arrangements necessary to the complete execution of the plan of removal, and to the ultimate security and improvement of the Indians, should be made without further delay. Those who have already removed, and are removing, are sufficiently numerous to engage the serious attention of the Government; and it is due not less to them, than to the obligation which the nation has assumed, that every reasonable step should be taken to fulfill the expectations that have been held out to them. Many of those who yet remain, will, no doubt, within a short period, become sensible that the course recommended is the only one which promises stability or improvement; and it is to be hoped that all of them will realize this truth, and unite with their brethren beyond the Mississippi. Should they do so, there would then be no question of jurisdiction to prevent the Government from exercising such a general control over their affairs, as may be essential to their interest and safety. Should any of them, however, repel the offer of removal, they are free to remain; but they must remain with such privileges and disabilities as the

respective States, within whose jurisdiction they live, may prescribe."

[I-109] Q. Thank you, Dr. Cleland. Would you say that that, at that point in time, did indeed encapsulize what the federal policy was towards removal?

A. Insofar as this is President Jackson's understanding. Congress previously had passed a Removal Act, which, in fact, permitted the President to exchange land east of the Mississippi for land to the west. And it contains no language that I know of that relates to the privileges of the respective states.

Q. Thank you. I'm next going to refer you to Exhibit D-10. Does your copy have some notes and highlights on the margins?

A. It does.

Q. Okay. I'm going to switch these with you. Dr. Cleland, on page 160 of Exhibit 10, which is a report of the Office of Indian Affairs, dated November 22, 1832 – it's a House document, serial number 233 – page 160, and the first full paragraph before the end of the page at 160, starting with "Kindred benefits," –

A. Yes.

Q. – there's another statement about what removal policy was supposed to accomplish or what it was supposed to stand for. Could you just read that short paragraph, too, please?

A. "Kindred benefits may be calculated on in the institution of the comprehensive scheme, adopted by the

Government for the removal of the Indian tribes to territories in the west, now

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[I-113] that they made in 1836, how would you compare that cession area to the cession that was made later in 1837? Was it a similar area?

A. Well, the 1836 cession of Michigan spans the region from Lake Superior to the Grand Valley. And the Grand Valley and along the west coast of lower Michigan is, in fact, farm country, whereas in the eastern part of the Lower Peninsula and in the Upper Peninsula, it is very much like the territory that we were talking about in northern Wisconsin.

Q. Were privileges to hunt and fish reserved in that 1836 treaty?

A. Yes, they were.

Q. Were those privileges qualified?

A. Yes, they were.

Q. Dr. Cleland, I'd now refer you to Defendants' Exhibit No. 12, and that is an opinion of the Attorney General's Office of the United States, Butler to Poinsett, April 20, 1837?

A. Yes.

Q. And, in that opinion, isn't it correct that the Attorney General is saying that the Ottawa and Chippewa, by stipulation of the treaty for the right of hunting

and fishing on the land ceded with the other usual privileges of occupancy until the land is required for settlement? That was the qualifier in that treaty, wasn't it, that the Indians would be able to stay on the lands and hunt and fish until it was required for [I-114] settlement?

A. Whatever that means, yes.

Q. And the Attorney General seems to say what it means in the next sentence there, doesn't he?

A. Yes.

Q. That it must be regarded as reserving the use of the ceded lands for all purposes of Indian occupancy, as existed prior to the treaty, until such lands are actually patented or required for settlement, but then that privilege shall cease. Isn't that the tenor of what the Attorney General is saying there?

A. That's the tenor of this Attorney General's opinion, yes.

Q. Thank you, Dr. Cleland. Moving a little closer to the actual 1837 treaty that is at issue here, Dr. Cleland, you are familiar, aren't you, with the Appropriation Act that provided for money that would be used to enter into a series of treaties with these Chippewa?

A. Yes, I'm familiar with that.

Q. And are you also familiar, Dr. Cleland, that that Appropriation Act stated that the monies would be used to enter treaties and provide for the Indians' removal?

A. Yes. The Act dealt with a series of Indian tribes, correct.

Q. And isn't it also correct, Dr. Cleland, that had it not been for that appropriation, that these particular treaties,

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[I-132] Q. But did you have any specific documentation of that, Dr. Cleland?

A. Yes. I think the letter that Medill wrote his instructions for the 1847 treaty would indicate that, or it indicates that to me.

Q. Or at least that it was contrary to what your understanding of what the treaties provided for?

A. No. Contrary to what I know of the historical materials around this time. This was a time in which I don't think anybody was anxious to remove the Chippewa from Wisconsin, particularly the traders and miners and timber people for whom the Chippewa were providing valuable services. And when Medill says that the Chippewa were anxious to remove, I think that is utterly and totally incorrect.

Q. Let's compare that with the next exhibit that I'm going to give you, Dr. Cleland, which is an 1849 report from the Commissioner of Indian Affairs. And by that time it's Orlando Brown, is that correct?

A. I believe so, yes. Yes, that is correct, Orlando Brown.

Q. And this document can be found at Newell footnote 30. It's a series of Commissioner reports.

Dr. Cleland, could you read the last paragraph on page 943, starting with "The Indian title has been extinguished"?

A. "The Indian title has been extinguished to put a comparatively small portion of the country within the limits [I-133] of the territory, lying principally on the east side of the Mississippi, being bounded on the north by a line extending east from opposite the mouth of the Crow Wing River until it intersects the western boundary line of Wisconsin at about 92 degrees, 15 minutes west longitude; on the east of that boundary, from the above point to the headwaters of the St. Croix River and down to the Mississippi, and on the west and southwest by the latter river. The country above the northern boundary belongs to the Chippewa Indians of Lake Superior and the Mississippi, though many of those Indians still remain by sufferance on the land south of it, which they ceded to the United States by the treaties made with them in 1837 and 1842."

Q. And then continue on to the next page.

A. "They are under obligation to remove from them whenever required by the President, which should be at an early day, as their longer residence there is incompatible with the tranquility and interests of our citizens who suffer annoyances and losses from their depredations." Continue?

Q. Sure.

A. "And in view of the rapid spread of our population in that direction and of the permanent welfare of the Indians, it may be expedient at an early period to renew

the effort unsuccessfully made in 1847 to purchase all the remaining lands east of the Mississippi up to our northern boundary, and [I-134] provide for their removal and concentration west of that river, where, confined within narrow limits, they will be compelled, as the game becomes scarce, to give up the chase and their wild and unsettled mode of life, and to resort to agriculture and other civilized pursuits. In such a situation, too, the government, aided by the zealous missionaries of our various religious denominations, would have a far better opportunity, effectively, to bring to bear upon them its policy and measures of civilization of our Indian tribes by means of manual labor schools and instruction and aid in agriculture and the mechanical arts."

Q. Thank you, Dr. Cleland. Would you say that that indicates what the federal view of removal policy was at that point in time?

A. No, I don't think there was much of a federal removal policy at this point in time. I think this indicates what Orlando Brown thought about the relationship between the United States and these particular Indians.

Q. Thank you, Dr. Cleland. Could you give the date of that report?

A. Annual Report of the Commissioner of Indian Affairs for 1849.

Q. And that was November 30th of 1849?

A. November 30, 1849, yes.

Q. At about the same time, Dr. Cleland, a resolution from [I-135] the Minnesota territorial legislature was coming to Washington, isn't that correct?

A. Yes, at about that same time.

Q. And within that resolution was a request that the privileges granted under the 1837 and '42 treaties to the Chippewa be expressly revoked and that the President required them to remove from those ceded lands, isn't that correct?

A. That was the gist of the memorial, yes.

Q. And isn't it also correct that by February, 1850, a few months later, a few months after the resolution and this report from the Commissioner of Indian Affairs, that President Taylor did, in fact, issue an executive order?

A. Yes, he did.

Q. Did you find any indication that order was ever expressly revoked by the government?

A. That order was suspended and then, as a matter of subsequent treaties, was reversed.

Q. But did you find any official proclamation or presidential order that said that the 1850 order was no longer in effect?

A. No. There is no order that does that that I'm aware of.

Q. Thank you, Dr. Cleland. With respect to the suspension of the removal effort, how was that communicated?

A. The suspension order came from the Secretary of Interior, and it went down to the Commissioner of Indian Affairs and

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[I-145] and gardens were fenced in as protection from the foraging livestock. And Chippewa, at least at the beginning, when they encountered a cow in the woods, would make no distinction between a deer, perhaps, and that cow, which a white settler would regard as private property.

Q. Would you say that also the kind of the context of depredations would have included just general fear and anxiety on the part of either the missionaries or the new settlers to the region because of the presence of the Indians to their communities and just the misunderstanding of what that may mean, or an actual, perhaps, conflict that may result?

A. In some cases, I think because of the way in which Indians were viewed in the context of western culture as savages and barbarians and cruel and warlike, that settlers coming into the region with those ideas would have been terrified just at the sight of an Indian.

Q. Thank you, Dr. Cleland. Your testimony this morning also referenced the treaty negotiations for the 1855 treaty as well. In that discussion, you testified as to the federal government's intent on which lands that they were trying to obtain a cession from. And I believe that you testified that it was the areas in the northwest part of the state of Minnesota, isn't that correct?

A. Yes.

Q. And with respect to your testimony, isn't it also correct

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[I-150] had no copy of the treaty with me – that many lumbermen thought that the treaty insured protection to their rice crops – that all the Indians so understood it, and last and most powerful was the reason that this has been an unsettled matter for five years, during which time from five to ten opportunities have transpired for settling it and the neglect of which is much complained of by proprietors along the river – I did not feel justified in forcing from the Indians a right they had never ceded."

Q. Thank you, Dr. Cleland. With reference to when that dam was placed there, do you recall what year it was put in?

A. I believe it was put in in '49 or '50, perhaps.

Q. And if we assume that it was put in in '49 – and there is a letter P-19, I think, that will verify that – in 1849, wouldn't it be correct, Dr. Cleland, that the Chippewa would still have had a right to hunt and fish in that area that would not have been affected by any later federal action?

A. Yes. That's part of the 1837 cession.

Q. And I believe your testimony this morning was that the reference that Mr. Hamilton has to the treaty was the 1837 treaty, is that correct?

A. Yes.

Q. The letter doesn't actually say that that's the treaty he's referencing, though, does it?

A. No, it doesn't. That was my view.

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[I-166] of it as much as anyone. I know its value and feel its want. But if I wish to educate my children, I can take my own money and employ my own teacher. I want to educate my children."

Q. Thank you, Dr. Cleland. That's enough. Again, Hole-in-the-Day is speaking out as to the changes that at least he perceives are facing the Mississippi Chippewa at that time, would you agree?

A. Yes.

Q. Now, when the Mille Lacs chiefs had left for Washington, isn't it correct that they were concerned with allowing Hole-in-the-Day to speak for them, and they insisted on at least being present at that negotiation so that they could be represented?

A. Yes.

Q. And we do know that they made it to the negotiations, presumably when the interpreter that was with them showed up. Was it Clement Beaulieu?

A. Yes. That's all we know, however.

Q. And that they were there for the signing of the treaty?

A. Yes.

Q. I'd like next to refer you to Exhibit D-41, Dr. Cleland. And that exhibit is a petition from the Mississippi Chippewa to the President, Secretary of Interior, and Commissioner of Indian Affairs of December 24, 1855?

A. Yes.

[I-167] Q. The original handwritten one is kind of a faded copy that you have there.

A. Right.

Q. I'll just bring you a little clearer version of that, and then there is also a transcription behind it.

Dr. Cleland, I refer you to the second page of the transcription at the end of the original longhand petition. And in the large paragraph at the top of the page, could you begin reading with the sentence "While we were engaged"?

A. This is a letter from Mah-yah-che-we-tong to the President of the United States, no date, 1855. "While we were engaged in making our treaty last year, many were" – illegible here – "were entertained and many groundless rumors circulated among our people; but when we returned amongst them and gave them a full and fair explanation of the attitude in which the Government stands toward them, and of the abundant provisions made for them in our treaty, all expressed their entire satisfaction and very many not only expressed a desire to follow the ways of civilized life, but so far as they could, without implements, without clothing and without money, they have shown their intention to become industrious, settled and civilized now. And they have done this both because you wished it, and their own interest and happiness seems to demand it."

Q. Thank you, Dr. Cleland. And is that petition signed by [I-168] one of the representatives of the Mille Lacs Band?

A. No, this is not signed by a representative of the Mille Lacs Band. This person we have no record of. I don't believe this person is a chief. His name does not appear on any of the treaties or in any other communications we can find except this one.

There are no prominent chiefs signing this document. So it's very difficult to say what the source and intent of the document is. But I don't think this document expresses the views of the Mille Lacs Band.

MR. SZOTKOWSKI: Thank you, Dr. Cleland. I think we'll close there for today, Your Honor.

THE COURT: Okay. We'll see you at 9:15 tomorrow.

(Adjournment taken)

Certified: /s/ Edith M. Kitto
Official Court Reporter

* * *

[II-192] Q. Yes.

A. I'm sure they did, but they traded on quite a different system, a totally different economic system.

Q. And I was leading to the question about languages. They did trade, at least, with French and English speakers. Were there others with whom they were – "conversant" is probably not the right term – were there others with whom they traded in different languages?

A. I know that the Chippewa traded extensively with the Sioux, for example; I'm sure the Fox, the Winnebago, Menominee, all of their neighbors.

Q. Language will be important as we talk about the treaties. You've mentioned the intermarriage. Was it frequent for the children of the marriages to speak both languages?

A. Yes.

Q. Were there lots of people in Chippewa country that spoke several languages?

A. Yes.

Q. The term in the treaties it uses, half-breeds, is – how many were there in the Chippewa area about the time between '37 and '55?

A. I don't know. There were a fair number. I wouldn't venture a guess.

Q. Was it hundreds or thousands?

A. Probably hundreds.

[II-193] Q. Another source of translation or information, I presume, was the missionaries. How widely dispersed were missionaries in the Chippewa country at the time we're speaking of, '37 through '55?

A. Well, there were mission stations at L'Anse, Bad River, La Pointe, Pokegama, and other places outside of the region.

Q. As a general proposition, were they sympathetic to the Indians?

A. Yes, they were.

Q. I presume that was one of the motivations?

A. Yes.

Q. And in your report you speak of some biases you might expect from the missionaries' accounts, if I recall correctly, because, for example, they had an interest in Christianizing and, perhaps, overstating the effects of their efforts in that way?

A. Well, they had interests in – their interest, of course, was in converting Chippewa people to Christianity. That was their perhaps main interest.

They also had their own interests. The mission societies had built mission establishments and farms often in this region. And so they had sort of an institutional interest as well.

Q. Did they teach Indian children or adults, or both?

A. Yes, they did.

[II-194] Q. If you know, was the teaching in English or Chippewa, or both?

A. It varied, depending upon the denomination.

Q. So at least some of the Chippewa had learned to speak English also from these missionary schools?

A. Some of them had, although the Chippewa themselves, I think, noted on many occasions that these schools were notoriously ineffective.

Q. The Chippewa noted that?

A. Yes.

Q. And to whom were they – was this being communicated in English, I'm interested or amused to find out, or was it being communicated in Chippewa?

A. Well, they usually complained when treaty time came around, and the government was trying to insist that their funds be used to support teachers and schools. And they frequently noted that these schools were not effective – in other words, that they were not teaching children the English language.

Q. Are you referring to Hole-in-the-Day's inquiry or direction or impetus towards the Indians controlling disbursement of those funds for schools?

A. I think Hole-in-the-Day may have had another objective in mind there. I think he wanted to control the distribution of money. But, yes, statements similar to that.

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[II-204] together. A large group of people assembled, several thousand at St. Peters. They had to come into Sioux territory to do that, by the way.

And on that occasion various people with various interests also assembled. Missionaries were present; traders were present; there was military present. It was quite a to-do. And the treaty transpired.

Q. If I can help you with the account, first you said there were several thousand people there, including – I think the account gives at least several of the missionaries that we've talked about, Boutwell and one other. Probably most of the missionaries were there, do you believe?

A. No, I don't think most of the missionaries were there. There were missionaries there.

Q. I think I misspoke. Brunson was one of those?

A. Yes.

Q. Of course, what I'm trying to focus on, in part – I'll be real transparen' about this, Dr. Cleland –

A. Well, there was Hercules Dousman, who was a trader; Sam Stanbog, who was a government agent later on, at least; Lyman Warren, who was a trader; a number of interpreters.

Q. As well, among the thousands which you've mentioned, would have been some of the half-breeds which you described as having bilingual capabilities?

A. Yes. There would have been half-breeds there with [II-205] bilingual capabilities, yes.

Q. And family members, some of whom – I understand the complaints about the education system – but some of them did speak some English?

A. Yes, that's true.

Q. And the treaty was read aloud and then followed each provision with a translation, isn't that correct?

A. That's how the treaties were conducted, yes.

Q. And then discussion, some of which we have in the journals?

A. Yes.

Q. Almost a footnote here, but there has been debate at some point in time over the quality of translation of the treaty. Your conclusion in this case, if I recollect, is that the translator was very competent?

A. I don't know whether I have said that or not. I would think that these translators were – they were certainly people that spoke both languages.

They apparently had different facilities with the language, because they used certain interpreters to go from Ojibwe to English and others to go from English to Ojibwe. Why that was true I don't know, but I would assume it had something to do with their ability to speak the languages.

Q. And we had kind of a double- or triple-check system, as you've described this, with others present who had the ability [II-206] also to translate directly from English?

A. When you're working between two languages, I suppose, and have people with various levels of speaking ability and ability to understand, that is the situation that you get around all of these treaties. It's still a difficult process, still a difficult process of dealing with a group of people that speak a different language, or people that speak two totally different languages.

Even if you have people that are bilingual, and even if you have some of those people negotiating who know some of the other language, it's still a difficult process.

Q. Some of the provisions, the treaty journal reflects, were specifically discussed, is that correct?

A. There is a marginal note in the treaty journal that relates to that problem.

Q. And among them the term – one of them we're focusing on in this litigation – "at the pleasure of the President." That was a matter that was brought up for discussion?

A. In the context of the treaty journal?

Q. Isn't it reflected in the treaty journal?

A. I don't believe so.

Q. What's the source of the discussion or inquiry about that term?

A. I believe that was the Boutwell letter, in which he said that the Chippewa would not understand the duration of a man's [II-207] pleasure.

Q. So the discussion of potentially leasing the land you did not take to relate to the "at the President's pleasure" proviso?

A. Well, they weren't leasing the land. They were selling it.

Q. Well, that was made abundantly clear from the government's side. Didn't the Chippewas suggest that they would prefer a shorter term to the treaty?

A. In the negotiation of the treaty?

Q. Yes.

A. As I recollect, yes, they did suggest a lease on the land and that then there would be a further negotiation.

Q. And that was explicitly rejected?

A. That was explicitly rejected.

Q. When we will later talk about – jumping forward a little bit to the 1850 order, I believe your testimony yesterday was, your research found no reason for the 1850 order. Was that – you found no reason for the order with respect to the privilege of hunting and fishing, or no reason for the order with respect to the revocation or the removal?

A. Well, I don't think I said that at all. I think there was plenty of reasons for the removal order, but none of them had to do with hunting or fishing. It had to do with removing Wisconsin Chippewa to Minnesota.

[II-208] Q. In that discussion in several places, you talked about depredations. Do you understand there to have been a depredation standard for the invoking of the President's authority as reason for the 1850 order?

MR. SLONIM: Your Honor, I'm going to object to the form of the question. I can't understand what he's asking.

THE COURT: Would you rephrase your question, Mr. Johnson.

BY MR. JOHNSON:

Q. Did you understand that depredations were a prerequisite or a pre-condition for the President exercising the authority he did under the 1850 order?

A. No.

Q. Under the terms of the – I am jumping around a little bit, back to the 1837 treaty, which said that the hunting and fishing was only at the pleasure of the President – do you have an understanding of any pre-conditions before the President could revoke or terminate the privilege of hunting and fishing?

A. No. I don't understand it that way.

Q. So you read "at the pleasure of the President" to give the President unbridled discretion to terminate those privileges?

A. No, I do not.

Q. What I'm trying to grope towards, what would be reason

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[II-221] Q. And there you mentioned he was chief of the Mississippis, wasn't he?

A. He was chief of the Gull Lake Band.

Q. Which is a group of the Mississippi?

A. Yes.

Q. And there you mentioned that the lion's share of the annuities ended up going to the Mississippi bands?

A. Yes.

Q. Did Hole-in-the-Day play a role in negotiating that part of the treaty, or that treaty?

A. I think he did.

Q. Well, the treaty journals reflect he did negotiate some favorable provisions in the treaty of 1855, don't

they? For example, once again, the journals will reflect him negotiating increases in the amounts of money paid?

A. Yes.

Q. And you don't doubt that he spoke for everyone when he was getting the money increased?

A. I don't know, and I don't think he was ever speaking for the Mille Lacs.

Q. But the Mille Lacs did accept the benefits of that part of the negotiation?

A. I believe they did, yes.

Q. And there's nothing – I believe you said, in response to Mr. Szotkowski's question, you didn't have any treaty journal [II-222] citation for their disagreement with what Hole-in-the-Day was doing. Do you have any other citation?

A. Yes. There are lots of other citations that there was a long-standing conflict between the Mille Lacs and Hole-in-the-Day from the '47 treaty onward, and up until the 1862 so-called Hole-in-the-Day revolt, in which, in fact, the Mille Lacs took a military stand directly opposed to Hole-in-the-Day. So there's also a 25-year history of this opposition.

Q. The thrust of my question, however, dealt with the 1855 treaty and its negotiation, and whether there was a showing of discontent with Hole-in-the-Day's negotiation of the provisions of the treaty. I believe you said not with respect to the money.

Were there other parts of the treaty that you have documentation of – must be outside of the journals,

because there is none in the journals – is there some documentation of disagreement at the time, 1855?

A. Well, as I told Mr. Szotkowski this morning, there's no reference in the treaty journal to the Mille Lacs at all. So we have no way from the journal to know one way or the other how they felt about any of these provisions.

Q. When did the Mille Lacs arrive at the 1855 treaty, by the way? Did your research disclose that?

A. No. We only know that there was an interpreter who came

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[II-226] exercising hunting, fishing, and gathering at the time?

A. And did.

Q. And did. I want to return to the question of – at the risk of beating a dead horse, one last stroke, Your Honor – the 1837 treaty and whether it was intended to allow removal. And you had characterized it as not a removal treaty. Are you also saying, Professor Cleland, it was not intended or expected that removal would occur as a consequence of the '37 treaty?

A. Yes, that's what I'm saying.

Q. You're saying it would not?

A. It would not.

Q. I'm handing you a copy of a page from your recently published book, "Rites of Conquest."

A. Yes.

Q. Would you read the highlighted portion of page 236?

A. "Consider, for example, the treaty of Washington, 1836, left the Michigan, Ottawa, and Chippewa in temporary reservations 'that could be terminated by the government at any time.' Likewise, in northern Wisconsin and upper Michigan, the government had been anxious to acquire timber in the treaty of St. Peters of 1837 and minerals with the treaty of La Pointe, 1842, that they simply left the Lake Superior Chippewa wandering the ceded territory. At any time they could be ordered to be removed by order of the President."

[II-227] Q. I think you can stop there. That was your conclusion when you wrote the book last year?

A. No. I wrote this in about 1990, prior to the time that I had read any of these documents about the treaty or prior to the time that I had even read the treaty journal. And this was, after all, the policy of the government in 1850, to remove these people.

MR. JOHNSON: I don't think I have any further questions, Your Honor.

THE COURT: Mr. Thompson?

MR. THOMPSON: Very briefly, Your Honor.

CROSS-EXAMINATION

BY MR. THOMPSON:

Q. Randy Thompson, representing the Landowners in this action.

Is it your opinion, Dr. Cleland, that the privilege of hunting, fishing, and gathering granted in the 1837 treaty is a permanent privilege?

A. Permanent in what sense?

Q. In the sense of it never ends, unless there's some other agreement ending that provision.

A. I think that the Chippewa could hunt, fish, and gather in this territory as long as they remained there.

Q. So the answer to my question is, it's a permanent

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[II-240] live.

MR. SLONIM: I have no further questions, Your Honor.

THE COURT: Mr. Szotkowski?

MR. SZOTKOWSKI: Yes, Your Honor.

RECROSS-EXAMINATION

BY MR. SZOTKOWSKI:

Q. Dr. Cleland, I believe that it's been your testimony with Mr. Slonim that after the missionary correspondence of the late 1830s, early 1840s, that there was no

further correspondence relating to removal by the missionaries, is that correct?

A. I don't think in regard to this treaty. There were certainly many concerns expressed by the missionaries after the 1842 treaty.

MR. SZOTKOWSKI: What I've given the witness is a document, dated August 2, 1850, from Missionary Hall to the Mission Board, and it could be found at Newell footnote 37 and 38.

BY MR. SZOTKOWSKI:

Q. Dr. Cleland, are you familiar with this particular correspondence from Reverend Hall?

A. Yes, I believe I am.

Q. Okay. Would you turn to page 4 of that document, please?

[II-241] A. Yes.

Q. And would you start reading under the section entitled "Removal of the Indians"?

A. "For the last two years, reports have frequently reached the Ojibwe residing in the lands which they have ceded to the United States government, that they would soon be required to vacate these lands and remove farther west and north. This subject has for some time caused some agitation in the public mind, though nothing official has been communicated to them on the subject until the past winter.

"In 1837, the Indians residing in the country contiguous to the Mississippi on the east side of the stream sold

their lands to the government as high up as where Crow Wing River unites with it. They had the privilege granted of remaining on these lands and occupying them for the purpose of hunting, collecting, and wild rice, et cetera, until the President should notify them they must remove.

"In the fall of 18" – sorry, I can't read that date; looks like 22 on my copy – "the Indians on the side of the country bordering on the south shore of Lake Superior" – oh, it must be '42.

Q. I believe it is '42.

A. Yes – "bordering on the south shore of Lake Superior likewise sold their portion of the country, stipulating also to remove at the demand of the government. No one then [II-242] thought that much of this land would be wanted for actual settlement for a long series of years and that the Indians would be allowed to remain on it as long as they were quiet and peaceful.

"But the last 12 or 15 years have wrought a great change. Wisconsin, within whose chartered limits a part of these lands lie, has become a state, and Minnesota is rapidly becoming a populous territory. Considerable portions of these lands are wanted by settlers, some for valuable timber they contain, others for minerals they contain, and more for actual cultivation. As settlers press forward on the lands where the Indians reside difficulties often occur between them and the whites.

"Petitions have been forwarded by the legislatures having jurisdiction over these lands to the general government for the removal of the Indians. Consequently, the President has revoked the privileges granted the Indians

of occupying these lands and has ordered their removal the present season. This order reached them early in the spring, and they were directed to be in readiness to remove early this summer. Nothing has yet effectually been done to accomplish their removal the present season. An effort will doubtlessly be made this fall to effect it. The country to which they are required to remove is that still owned by them and other portions of the tribe further on to the west and north.

[II-243] "What influence their removal will have upon their future conditions, the prospects of the mission, it is impossible to foresee. The mission is waiting to see what steps the government will take and where different bands will be located before they can intelligently decide as to their duty."

Q. So, Dr. Cleland, at least Reverend Hall is aware that from 1837 on, it was foreseen that these Indians could potentially be removed from those ceded territories?

A. Well, that was Reverend Hall's view at the time. He had also been a very strong advocate against removal until John Watrous promised him a superintendency at the Indian farm at Crow Wing, and then he suddenly became an advocate for removal.

Q. And had Reverend Hall, prior to this, also had some correspondence with Reverend Treat, notifying him that the Indians were going to be removed?

A. Yes. I think he was notifying Reverend Treat about the arrival of the removal order.

Q. I'd like to show you another document, if I may have permission by the Court. And this document is dated February 25, 1850, and it can be found at Plaintiffs' Exhibit 90, Newell footnote 38.

Dr. Cleland, could you please read the first three paragraphs on the second part of that document? – second page of that document, I'm sorry.

[II-244] A. Second page. And you want me to read, again? –

Q. "The Indian agent at this place" – oh, excuse me.

A. That paragraph starts on the preceding page.

Q. Sure. You can start on the preceding page.

A. "But as to our prospects for the future it is not easy to say what they are. The Indian Agent at this place was officially informed a few days since, that it was in contemplation in Washington to remove the Indians soon from the ceded territory. He was ordered to discontinue" – "discontinue" is struck out – "dismiss the farmer at Bad River, which will deprive the Indians of aid from the Government in plowing their ground next spring. The Indians have been informed of this, but they manifest no great excitement. In the treaties of 1839 and 1842, they agreed to remove when they should be required by the government, although they did not expect to be called upon to do so, at least till the time they should receive the last payment for their land."

Q. Dr. Cleland, that 1839, would you say that that probably should have been 1837 there?

A. It probably should have been, yes.

Q. Okay. Please continue.

A. "What course the Government will take to remove them we have no information. It is thought that a proposition will be made to them by the Government to sell the rest of their land, [II-245] east of the Mississippi, and that they will locate the Ojibwe somewhere about the headwaters of that river or to the west of it. It is stated also that the Indian Agency will be removed from this place to some point on the Mississippi. Of course the annuity payments will be made there, when that is done. It is said that they may be removed next season. But this seems to me to be impossible.

"How they will be affected in case the Government actually orders them to remove, I do not know. I am inclined to think, that if a conciliatory course is pursued with them that most of those about this place will make no resistance."

Q. You can stop there, Dr. Cleland. Does that, again, indicate Reverend Hall's knowledge of the federal government's policy to try to get those Indians removed?

A. Well, that's what his opinion was of the removal order and its justification, yes.

Q. Dr. Cleland, when Mr. Slonim was first asking you about the journal of proceedings for the 1837 treaty on his redirect, is it my understanding – and from what Mr. Johnson had asked you when he finished his cross-examination – is it my understanding that you're telling this Court that you had not reviewed that treaty journal prior to the time you wrote the book "Rites of Conquest"?

A. Yes, I think that's true.

Q. Dr. Cleland, when were you first involved in the [II-246] Wisconsin litigation, the Lac Courte Oreilles litigation?

A. Sometime in the '70s.

Q. And did you testify at trial in that case?

A. Yes, I did.

Q. And you are telling this Court that throughout your testimony at trial, you did not review the treaty journal in this proceeding related to the 1837 treaty?

A. I don't believe I did, because my task in that litigation was not to provide ethnohistorical testimony about these treaties. My task was to look at Chippewa resource use, the kind of resources they used, the devices they used for capture, and that sort of information, and it was strictly confined to that kind of testimony. That's what I did for the *LCO-Voigt* case.

Q. Dr Cleland, would have you [sic] testified in 1985 as to the parts of what you were just saying as far as what the Chippewa were using for resources?

A. My participation in the *Voigt* case was in the second phase of the case. And I did not participate in that case as a witness involved with the interpretation of the treaties. I simply was studying resource use.

Q. Okay. And, aside from that, what you stated is, you had not reviewed the 1837 treaty journal prior to the time you wrote the book?

A. I don't recollect that I did, no.

[II-247] MR. SZOTKOWSKI: Your Honor, the State will make an offer of proof, as soon as we can make it available for the Court, that, in fact, Dr. Cleland had reviewed the 1837 journal in relation to the LCO litigation and, in fact, had it in front of him in his testimony in two separate exhibits from both the plaintiffs and the defendants in that litigation, and went on at quite lengthy discussion as to what the journal contained and what the provisions of the journal were.

And as soon as we can get the transcripts from that litigation, we'll make that available for the Court. No further questions.

THE COURT: Mr. Johnson?

RECROSS-EXAMINATION

BY MR. JOHNSON:

Q. Dr. Cleland, at the time you wrote, the treaty of St. Peters, 1837, left the Ojibwe wandering the territory, "at any time they could be removed by order of the President." Besides the treaty journal, is there any other document you had not researched in writing this book, or in the prior testimony, that led you to the contrary conclusion?

A. I'm not sure I understand what you're asking.

Q. What did you rely on in this conclusion – your reading of the treaty itself? – your conclusion, "At any time they could be removed by order of the President."

* * *

[V-617] MR. SZOTKOWSKI: That's right.

THE COURT: I indicated you could do it when this witness was completed, if he were ever completed.

MR. SZOTKOWSKI: Your Honor, the State of Minnesota would make the following offer of proof regarding Dr. Cleland's testimony earlier in the week, where I had related that there were trial transcripts from the *LCO* trial in 1985 that did, in fact, contain discussion of Dr. Cleland's direct testimony where he had reference to particular exhibits relating to the 1837 treaty journal, and that that discussion carried on to later direct or rebuttal testimony as well.

So at this time the State of Minnesota would offer copies of those transcripts to the Court to establish the statement that I had earlier made.

THE COURT: Okay. Are those certain pages of the transcript?

MR. SZOTKOWSKI: There are indeed, Your Honor. Would you like me to –

THE COURT: Okay. Perhaps you could state it for the record.

MR. SZOTKOWSKI: This is from the *Lac Courte Oreilles* litigation on December 10, 1985, in trial before the Honorable James E. Doyle. And the references are to Volume II of the transcript; the direct cite is Volume II-B-74. The first portion goes from 74 through 82.

[V-618] And then the second set is found in Volume VI, which would be the redirect or rebuttal testimony,

and that starts at Volume VI-A-35 through 36. And at this time I'd offer that to the Court, Your Honor.

THE COURT: Okay. Do you want to call your next witness, then, Mr. Slonim?

MR. SLONIM: Your Honor, Mr. Arum will be conducting the examination of our next witness.

THE COURT: Okay.

MR. ARUM: The plaintiffs call Dr. Helen Tanner.

HELEN TANNER,

called as a witness by the Plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ARUM:

Q. Dr. Tanner, when and where did you receive your doctoral degree?

A. I received my doctor's degree in history from the University of Michigan in 1961.

Q. What are your present positions?

A. I'm an historical consultant, and I also am a research associate at the Newberry Library in Chicago.

Q. And what is the Newberry Library?

A. The Newberry Library is one of about 16 private research

* * *

Cleland Re-Direct (Excerpts)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

(Caption Omitted In Printing)

* * *

[II-228] provision as long as they remain there?

A. Yes.

MR. THOMPSON: Thank you.

THE COURT: Mr. Slonim?

MR. SLONIM: May I just briefly approach the witness, Your Honor?

THE COURT: Yes.

MR. SLONIM: Your Honor, Professor Cleland would like just a moment.

THE COURT: All right. We'll take a brief recess.

(Recess taken)

REDIRECT EXAMINATION

BY MR. SLONIM:

Q. Professor Cleland, Mr. Johnson asked you some questions about the different communities or different groups that were present during the course of the 1837 treaty negotiations. One of the groups that was mentioned was the half-breeds. Do you recall that?

A. Yes.

Q. Did the half-breeds form a distinct community within Chippewa society?

A. They did. In fact, they had their own communities, such as the one at La Pointe.

Q. And were there others located in what's now Minnesota?

[II-229] A. Yes. There were some scattered around throughout the Old Northwest, yes.

Q. Was there a community at Crow Wing?

A. Yes, there was.

Q. Did the half-breed community, or metis, did they have an interest in the outcome of the 1837 treaty negotiation?

A. Yes. They received benefits under the treaty.

Q. What benefits did they receive?

A. Under Article III of the treaty, they received $100,000.

Q. In your opinion, would they have been motivated to inform the Chippewa of problems with the treaty?

A. I think they would have been most anxious that the treaty proceed.

Q. What about the traders? Did they have an interest in the outcome of the treaty?

A. They did.

Q. And what was their interest?

A. They received the sum of $70,000 by Article IV of the treaty.

Q. And would they have had a motivation to inform the Chippewa of problems with the treaty?

A. No, they wouldn't have.

Q. Let's turn to the missionaries. Yesterday Mr. Szotkowski asked you to read from a series of letters, all of which were written between August of 1837 and February of 1838 by a [II-230] couple different missionaries. Do you recall what the first of those letters was, chronologically?

A. Yes. That was the letter from Mr. Boutwell.

Q. And was Mr. Boutwell present during the course of the treaty negotiations?

A. Yes, he was.

Q. And did Mr. Boutwell indicate whether his concern about the possibility of removal was something that the Chippewa had agreed to or understood during the course of those negotiations?

A. His letter said that they did not understand that.

Q. Then I think Mr. Szotkowski had you discuss some letters from Reverend Ayer. Was Reverend Ayer present at the treaty negotiation?

A. No, he wasn't.

Q. How did Reverend Ayer learn about what had transpired?

A. Because Reverend Boutwell wrote to him soon afterwards.

Q. And how do we know that?

A. Because of the letter itself.

Q. The last letter in the series from the missionaries that Mr. Szotkowski had you read was a letter from Ayer, dated February of 1838, and I believe Mr. Szotkowski had you read the first question raised in that letter regarding how soon it would be until removal occurred. Do you recall that?

A. Yes, I do.

[II-231] Q. In that letter, did Reverend Ayer ask other questions about the possibility of removal?

A. He did. He asked, first of all, when removal might take place. He asked about a destination and whether there were some provisions for permission efforts there.

He asked about the payment to Chippewa, or whether there would be payments to Chippewa, for improvements that they made to the land. And he also asked whether there would be payments to the missionaries for their improvements.

Q. Did he also ask whether some of the Chippewa would be permitted to remain?

A. He did ask that, yes.

Q. What do those series of questions indicate to you about federal plans to remove the Chippewa at this time?

A. It indicates to me that there were none.

Q. Are these matters – the timing of removal, the location of removal, payment for improvements, and so

on, whether some can remain – are those matters that are typically addressed in a removal treaty?

A. They're addressed in the Removal Act, and they're also standard provisions of removal treaties.

Q. And are any of those matters addressed in the 1837 Chippewa treaty?

A. They are not.

Q. Did you locate a response to Ayer's questions?

[II-232] A. No, I did not.

Q. Did you find further expressions of concern from the missionaries after Ayer asked this set of questions in February of 1838?

A. These letters, these three letters, were written over a six-month period immediately after the treaty. And from then on, they seemed to have been satisfied, because there are no other correspondence that I know of.

Q. Do you think it's reasonable to conclude from these letters that at the time of the treaty the Chippewa either understood or agreed that they could be removed?

A. No, I do not.

Q. Mr. Szotkowski also asked you about some correspondence, a letter from Lyman Warren to James Doty, and then a letter based on that from James Doty, the territorial governor of Wisconsin, to Secretary of War Spencer in 1841. Do you recall that discussion?

A. I do.

Q. Do those letters indicate whether Lyman Warren and James Doty believed that the Chippewa had agreed to remove in the 1837 treaty?

A. I believe those letters show that they understood that there was no such agreement.

Q. And why do you say that?

A. Because they were suggesting in that letter that there be [II-233] another treaty to resolve that issue.

Q. In Lyman Warren's letter, he says that the various Chippewa bands were willing to accept a proposition to remove. Do you find that to be a credible statement of the Chippewas, position with regard to removal?

A. No, I do not.

Q. Why not?

A. Because, in fact, Lyman Warren, as a trader, had very much a vested interest in the Chippewa. In fact, he received $25,000 himself, which was a small fortune in 1837, as a result of this treaty.

Q. And do you know whether he had tried to receive additional amounts in the 1842 treaty?

A. Yes, he did.

Q. Have you found any corroboration for Warren's characterization of the Chippewas' willingness to remove in the historical records you've looked at?

A. Pardon me?

Q. Have you found any corroboration of Lyman Warren's statement that the Chippewas were willing to remove in the historical materials you've looked at?

A. No. These materials are entirely to the contrary. Letter after letter, report after report, says that the Chippewa tenaciously held to their home territories and were unwilling to remove.

[II-234] Q. Let me move to the letters that were written at the time of the dispute regarding the Rum River dam. And I just want to clarify one matter.

There are three letters that I think you were asked about – a letter from Governor Gorman to Commissioner Manypenny on February 16, 1855, and that's Exhibit P-17, Your Honor; a letter from Lieutenant Hamilton to Lieutenant Stewart on March 9, 1855, and that's Exhibit P-18; and then, finally, a letter from Governor Gorman to a chief named Little Hill on June 4, 1855.

And, if I understood your testimony, you said that with respect to that last letter to Chief Little Hill, that what Gorman was saying was that at the time the dam was first put in about five years earlier, the Chippewas had rights to hunt and fish on the ceded territory, is that correct?

A. That's correct.

Q. With respect to the first letter, the February 16th letter from Gorman to Manypenny, in that letter was Gorman saying they had rights to hunt and fish five years earlier when the dam was put in, or was he saying they had rights to hunt and fish at the time he wrote the letter in 1855?

A. He was saying that they had rights there to hunt and fish prior to the time of the letter.

Q. What about at the time of the letter?

A. At the time of the letter as well.

[II-235] Q. And what about Lieutenant Hamilton's letter? Was he saying that, when he reported that the lumbermen and the Chippewa believed that the treaty protected their wild rice crops, was he saying that that was a belief as of the time he met with them, or was he saying that was a belief about the treaty at some prior time?

A. He was saying that he believed that this was a belief that was held at the time that he was there.

Q. In 1855?

A. Right.

Q. I want to turn to the 1850 treaty journal. Mr. Szotkowski asked you to read some lengthy passages from that journal into the record, and I'd like to ask you some questions about what those passages meant or how you construed those passages.

Professor Cleland, I'm handing you the copy of the typescript of the journal that you used yesterday. Did you have a chance to review that last night?

A. I did.

Q. And have you identified some passages that are relevant?

A. I have.

Q. In the passages that Mr. Szotkowski had you read, as I recall, one of the points that Hole-in-the-Day was making was that he was dissatisfied with the old system, and he thought that the Chippewas should change to a new system. Do you [II-236] recall that?

A. Yes, I do.

Q. And, in your opinion, what was he referring to at that point?

A. The old system he was referring to was the annuity system under the former Chippewa treaties.

Q. And what was the problem with the old system?

A. The problem was that, in Hole-in-the-Day's view, that Indians were receiving annuity benefits, or cash money, for services under these treaties, and, therefore, they would not engage in other activities which would promote their welfare and benefit.

Q. What did Hole-in-the-Day see as the solution to this problem?

A. Well, he saw what he said was labor. He wanted the Chippewa to labor. And, by that, he meant hunting, fishing, and gathering, among other things, perhaps.

Q. Is there any indication in the journal that Hole-in-the-Day considered hunting and fishing and gathering to be a form of labor that was desirable for the Chippewas to pursue?

A. Yes, there is, and I could read some of those.

Q. If you can identify by frame number, if you can see that, or at least a page on the typescript that you're reading from.

A. Yes. On page 29 of the typescript – this would be frame [II-237] number 383 – Hole-in-the-Day is speaking and says, "Before these payments commenced, we were better off than we are now. We then hunted and relied upon our own exertions, and our own traders furnished us in exchange for the fruits of our labors enough to supply our wants. Father, we were never in a state of poverty until after we received annuities. Why were we fed and clad then as well as now? We had to work in an honorable way."

Q. And what was Hole-in-the-Day referring to when he said, "We had to work in an honorable way"?

A. He was talking about hunting and fishing and gathering.

Q. And did you find any other references in the journal which indicated that either Hole-in-the-Day or other Chippewa chiefs, or even Commissioner Manypenny, anticipated that the type of work the Chippewa would engage in would include hunting, fishing, and gathering?

A. Yes, there are others. For example, Hole-in-the-Day commented on page 51 of the transcript, which is frame 439, when he said, "Father, there is one thing very essential for the Indians to know, that is, the day when they may expect payments thereafter. They should be made so that the Indians may not be detained long by the agency. They should be at a fixed day, say the 1st of

September. After that, we have to put away our crops and attend to our fisheries in the fall so as to be prepared for winter."

[II-238] Manypenny himself remarked, in the context of the discussion of payments, when he said, as on page 52 of the manuscript and frame 442, "At the same time, you should all avoid going into debt. Plant corn, cultivate your farm, sell fur, and pay as you go, and have accounts with nobody, no books, and you will find it much better then the present system of going into debt."

And, likewise, the Commissioner, in several places on page 52 and 53 of the manuscript, noted that, as Hole-in-the-Day requested, payments could be made in September so that they would not be interfering with the hunting, fishing, and gathering activities of the Chippewa.

Q. Professor Cleland, what other opportunities existed for the Chippewa, what other work opportunities existed for them, at the time this treaty was made?

A. In 1855, there were no other opportunities for these people to work. It may be true that they may have devoted more energy to agriculture. They had a government farmer located at Mille Lacs. We know that there were small farm plots that were developed, and we know that some Chippewa were actually working those plots.

But this was an activity of Mille Lacs of very short duration, perhaps 90 days. So if the Chippewa were going to engage in any other labor, it certainly had to be hunting, fishing, and gathering, because there was no other

way that [II-239] they could support themselves. There were no wage labor opportunities, for example.

Q. Did you find any indication in the treaty journal that if a Chippewa were to try to do what Hole-in-the-Day was talking about, to go out and farm more and to hunt and to trap more and be self-reliant, not to rely on government annuities, that something in this treaty might restrict what that individual was trying to do?

A. No, I don't think so.

Q. Mr. Szotkowski asked you whether, in 1854 and '55, the Chippewa were at a crossroads. And I think what he was trying to get at was whether the Chippewa either faced a choice, or chose, between a future in which they continued to have hunting, fishing, and gathering as something that was important economically and culturally, and, on the other hand, a future in which hunting, fishing, and gathering diminished greatly in importance to them. Is that a fair characterization of how anyone viewed the choice in front of them at this time?

A. I don't think it is. I think in 1855 it was clear to the Chippewa, including Hole-in-the-Day, I think it was clear to the government officials, to the trading communities, to everybody else involved in this, that the Chippewa were going to be hunting, fishing, and gathering into the foreseeable future, simply because there was no other way that they could [II-240] live.

MR. SLONIM: I have no further questions, Your Honor.

THE COURT: Mr. Szotkowski?

MR. SZOTKOWSKI: Yes, Your Honor.

RECROSS-EXAMINATION

BY MR. SZOTKOWSKI:

Q. Dr. Cleland, I believe that it's been your testimony with Mr. Slonim that after the missionary correspondence of the late 1830s, early 1840s, that there was no further correspondence relating to removal by the missionaries, is that correct?

A. I don't think in regard to this treaty. There were certainly many concerns expressed by the missionaries after the 1842 treaty.

MR. SZOTKOWSKI: What I've given the witness is a document, dated August 2, 1850, from Missionary Hall to the Mission Board, and it could be found at Newell footnote 37 and 38.

BY MR. SZOTKOWSKI:

Q. Dr. Cleland, are you familiar with this particular correspondence from Reverend Hall?

A. Yes, I believe I am.

Q. Okay. Would you turn to page 4 of that document, please?

* * *

White Direct (Excerpts)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

(Caption Omitted In Printing)

* * *

[II-255] A. Yes.

Q. Do they also include articles on the history and culture of the Chippewa?

A. Yes.

Q. And, as we've discussed, they include articles on various aspects of the fur trade?

A. Yes.

Q. Dr. White, did you prepare a report entitled "The Regional Context of the Removal Order of 1850," which has been marked for identification here as Exhibit P-302?

A. Yes, I did.

Q. And did you also prepare a report entitled "The Regional Context of the Removal Order of 1850 Supplement," which has been marked?

A. Yes.

Q. Do those documents set forth your professional opinions regarding the matters addressed therein?

A. Yes, they do.

Q. And are they the product of your own research?

A. Yes.

Q. Do you adopt those reports as your direct testimony in this case?

A. Yes, I do.

Q. Dr. White, I'd like you to summarize some of the opinions that are presented in your report. First, in your opinion, [II-256] what were the principal reasons for the issuance of the 1850 removal order?

A. Well, among the people who asked for the removal order and those who carried it out, I think that the prime reason was to increase the flow of goods and money into Minnesota Territory. At the time that this order was issued, the local people in St. Paul and elsewhere in the territory were very much dependent on government expenditures to increase the flow of money.

And it was often said among people, businessmen, people living in St. Paul, for example, you find references in the early newspapers to people saying, "Well, you owe me money, but wait until after the annuity payment so that I can pay you then."

And that usually meant that quite a few of the people involved were dependent on the Indian trade, on supplying goods to Indians. And if the Indians were paid in the territory, the money would go directly – would be spent with local traders and businessmen, and would then spread in a kind of really a classic economic multiplier effect, that the money would spread out through the territory.

And so I think that's the basic reason why they wanted to move Ojibwe into Minnesota.

Q. In the 1849 Minnesota territorial resolution calling for removal, there's an assertion that removal of the Chippewa is [II-257] necessary for the peace and tranquility of white settlements. Do you find that to be a reliable indication of the need for removal?

A. I really don't think it's a reliable indicator, because, in looking through the newspapers and other material on what was going on in Minnesota Territory at the time, there were very few references to problems involving the Minnesota Ojibwe. They just weren't mentioned. And certainly the Mille Lacs Ojibwe were never mentioned as causing trouble for white settlers.

Q. Was there a system by which white settlers could make claims if their property was damaged or if they had other problems with native people?

A. Yes. There was a government system that allowed people to get their claims, damage to property and so on, paid by the government from Indian money. And in looking through, for example, the records from 1849, I could only find one reference to anyone harmed by Ojibwe who was asking for payment, and it involved Willie Macon, the trader, along the Mississippi, who had a colt who was killed somehow. It didn't explain it, but that was the only case in a list of such claims from 1849 at the time Minnesota became a territory.

Q. What about – did you discover references to the incidents that Mr. Johnson mentioned earlier today involving some shootings?

[II-258] A. Yeah, there was a case involving Hole-in-the-Day – it was either late in '48 or early in '49 – when

Hole-in-the-Day – well, actually, the way they explained it was, Hole-in-the-Day was talking to this young man named Fairbanks, and the other man asked to see Hole-in-the-Day's gun. He put it out for the man to look at, and the gun went off. So the man was killed.

And there was no explanation, there was no suggestion, that – well, there was a few people who said, well, maybe Hole in-the-Day had intended something. But the gist of it was that there wasn't any attempt, that Hole-in-the-Day hadn't meant to kill this man. And, of course, that incident didn't involve the Mille Lacs Ojibwe at all.

MR. SZOTKOWSKI: Your Honor, if I may, the last line of questioning was more rebuttal to testimony that was received this morning. I was under the understanding that this really wasn't supposed to be a summary of Dr. White's report. So I'll object. It's beyond the scope of direct.

MR. SLONIM: Your Honor, these are matters that are discussed in Dr. White's report. He has a very careful discussion of each of these incidents in the report. And I am highlighting them because they've been raised, but it's from the report.

THE COURT: It's relevant. Let's just move on.

[II-259] BY MR. SLONIM:

Q. Where was Hole-in-the-Day's band from, Dr. White?

A. Well, the band of which Hole-in-the-Day was a part originally had been at Sandy Lake. But they moved into the Gull Lake-Crow Wing area. So I think at the time, in the 1850s, that's where they were located.

Q. And were they a band that was within the 1837 ceded territory?

A. No, they weren't.

Q. So would a call for removal of bands from the 1837 ceded territory have any effect on them?

A. It wouldn't ask them to remove.

Q. Did you look also at another incident involving a shooting involving two German immigrants?

A. Yeah. In fact, that's the only incident I found in the local newspapers that involved the Ojibwe in the period leading up to the time of the resolution of the territorial assembly. And it took place at a store near Sauk Rapids where the allegation was that two Ojibwe had shot at two Germans and that – I don't think anybody was killed, but somebody was injured.

And the investigation said that the – I think it involved William Warren and some other people – said that the two men were from Gull Lake, and they would be perfectly willing to turn themselves in for any legal action, if that [II-260] was required by the State.

Q. Now, I think you mentioned that you saw depredation claims being made in this time involving other Indians in the Minnesota territory, is that correct?

A. Yes. Most of the complaints at that time involved the Winnebago, who had been recently removed from Wisconsin, Iowa area, had been moved to the area west of the Mississippi southwest of Crow Wing. And most of the complaints at that time had to do with those Winnebago leaving the reservation, supposedly harassing whites,

doing all sorts of things. It was difficult to confine them on the reservation, because they didn't like the reservation.

Q. Is the existence of those complaints significant to how you view the credibility of the territorial resolution?

A. Well, when you think about it, it is remarkable that, despite all these many complaints about the Winnebago, there was no call for their removal from Minnesota. And you can look back at that motive of government money being spent in the territory to see clearly why that might be the case, that no one was asking to remove the Winnebago, because they were already there and their monies were being spent in the territory.

Q. Did the actual course or implementation of the removal effort, did that tend to – how does that affect your analysis of what the real motives were?

[II-261] A. Well, contrary to anything that was said in the territorial resolution, when it came time to remove Ojibwe, it was not Ojibwe in Minnesota who were removed. It was Ojibwe in Wisconsin who were moved into Minnesota. And that's certainly not what the territorial resolution said it intended to achieve.

Q. And are there any other factors that you looked at in reaching your conclusion that the problems with the Ojibwe weren't the real reason for the call for removal?

A. Well, as I noted in my supplemental report, if you carefully compare the wording of the resolution of the Territorial Assembly in 1849 to that of a similar resolution passed by the Territorial Assembly in Wisconsin in 1842, the wording is almost identical throughout much of

the two orders, suggesting to me that there was very little interest in the actual circumstances of Ojibwe in Minnesota; that the resolution was simply a means of achieving some other end.

Q. You touched briefly on this, but did you find any evidence at all of any kind of complaints involving the Mille Lacs Band that might have prompted the call for removal?

A. I found no complaints about the Mille Lacs Band. In fact, I think there were several letters from – there was a letter from Ramsey and a letter from Agent Fletcher, who had jurisdiction over them, in which both of these letters praised the Mille Lacs Band for their behavior.

[II-262] Q. Once the removal was undertaken, what efforts were made to remove the Mille Lacs Band?

A. No efforts were ever made to move the Mille Lacs Band. In fact, I think that, instead, other groups were moved to Mille Lacs, or at least were allowed to move. Groups of St. Croix Ojibwe were allowed to move to Mille Lacs.

Q. Dr. White, in your opinion, why does the removal order refer to the revocation of hunting, fishing, and gathering rights?

A. Well, there's not a lot of discussion. In fact, there's no discussion about this portion of the resolution. But from my study of the way the resolution was carried out, it seems clear that this was in there as a means of achieving removal; that since there was no explicit statement in the treaty of 1837, in order to achieve removal,

they put in this wording about the revocation of hunting, fishing, and gathering.

Q. In your examination of the circumstances of this order and its implementation, did you find any discussion of a rationale for revoking hunting and fishing rights other than as it might relate to the removal of the Chippewa?

A. No. I found no such discussion anywhere at the time.

Q. Was the revocation of hunting and fishing rights ever actually communicated to the Chippewa? Were they told that their rights had been revoked?

A. Well, the only record that we actually have of some sort [II-263] of statement being communicated to Ojibwe was a statement, a circular, that Agent Livermore at La Pointe sent to various groups under his jurisdiction – that is, groups that were paid at La Pointe. And in that resolution, he does apparently – he doesn't actually give the full circular, as he called it – but he does say, you know, that he communicated the order, the full text of the order.

So, essentially, that would have contained the statement about the revocation of hunting and fishing. But the entire circular – nowhere else in the circular is there any discussion of this implementation, separately or one way or another, of this portion of the order relating to hunting and fishing and gathering.

The entire thrust of Livermore's statement had to do with accomplishing removal. And I found no other place

where any sort of rationale or any discussion of how this portion of the order would be communicated.

Q. You did find – did you find other evidence that indicates what kinds of things the Chippewa were being told about this order?

A. Well, yes. I mean, I think my report discusses all sorts of statements about the order, which always refer to it as an order for removal.

Q. Sticking with the part of the order that refers to the revocation of hunting, fishing, and gathering rights, you've [II-264] said that you haven't found evidence, apart from the possibility of the circular, that it was ever communicated to the Chippewa. How did government officials try to enforce that part of the order? What did they do to enforce that?

A. Nothing was ever done to try to enforce that portion of the order.

Q. Didn't government officials make some effort to stop the Chippewa from hunting and fishing on the ceded lands?

A. No. No, they did not. And everything that I have looked at suggests that they expected the Ojibwe to continue to hunt, fish, and gather before they removed, and they expected them to continue to hunt, fish, and gather after they removed.

Q. Aren't there some documents subsequent to the issuance of the order which talk about the revocation of hunting and fishing rights?

A. Yes. I think that there's one – there's another document, a statement before the Territorial Assembly of Minnesota in – it would be January, I think, 1851. I could show you in my report.

Q. If you'd like to refer to a page in your report, you can do that. Is this the document that's mentioned on page 6-14?

A. Yeah, I think it may be. Yeah, here it is. This is a statement, part of a speech, that Ramsey made to the Territorial Assembly of Minnesota at the second meeting of the Territorial Assembly. The first one was in the fall of '49, [II-265] and so this is the second one in January of '51. And this is his statement about the progress of the removal to this point.

He says, "The memorial of the Legislative Assembly for the removal of the Chippewas from their ceded lands was formally considered by the President of the United States, who was pleased to instruct me to notify the tribe that the privilege of hunting, fishing, and gathering wild rice on lands which had been sold to the United States would cease. The removal has not yet been entered upon owing to the lateness of the day at which Congress made the necessary appropriation, but the Indian Bureau will doubtless order the prompt prosecution of the movement in the spring."

Now, to me, this statement shows clearly the connection that was being made between that provision of the order and the removal. He says that the Legislative Assembly had asked for the removal of the Chippewas, and, in response, the President had revoked the hunting,

fishing, and gathering rights on lands which had been sold to the United States.

He further said that the removal has not yet been entered upon, and I think making it a perspective kind of statement, and, further, that these rights would cease – again, as kind of a future suggestion that once they removed, then those rights would cease.

Q. Dr. White, in your report, you discuss the implementation of the removal order and then a period of time at which the [II-266] order was suspended. Can you describe for the Court the circumstances that led to the suspension of the removal?

A. Well, I think the suspension was a direct result of the protests that were made against the order very early on in the spring of 1850. And the new Commissioner of Indian Affairs, Luke Lea, was ordered to prepare a report.

He, in I think it was August of 1850, he did nothing through the winter and early spring until June, at which point he did prepare a report. And some suggest he may have been influenced by the disaster at Sandy Lake, the deaths that took place there at the payment in November of '50.

In any case, he finally got around to writing his report in June of '51, at which time he suggested some modification of the order. Then he left Washington and went off to be with Alexander Ramsey at the Dakota treaties of the summer of 1851. So he was actually in Minnesota Territory, but I don't believe he ever visited Chippewa country.

Then he returned to Washington. Right about the time he returned to Washington at the end of August, there was some correspondence involving the acting commissioner, Charles Mix, who asked for some action in response to that report. And then the Acting Secretary of the Interior Graham authorized a suspension, which took place by telegram at the end of August, 1851.

Q. And in authorizing a suspension of the removal, did [II-267] Acting Secretary Graham refer to particular bands?

A. I believe that Graham may have – I think Graham spoke generally of the Chippewa.

Q. And then in notifying Agent Watrous, did Commissioner Lea refer to particular bands?

A. He referred to the – in the telegram, the official copy of the telegram that's in the letter books of the Indian Office, he referred to the Chippewas of Lake Superior.

Q. Is it your opinion that it was either Graham or Lea's intent that the removal would continue with respect to other bands?

MR. PERSIAN: Your Honor, I'm going to object to that. I don't see any foundation for his understanding of what this Commissioner Graham – there's nothing in the report about that.

MR. SLONIM: Your Honor, the letter from Secretary Graham is discussed in the report. The telegram from Commissioner Lea to Watrous is discussed in the

report. Other correspondence at this time which comments on what led to the suspension and how Lea viewed it being implemented is discussed in the report.

Letters from people who received the telegram are discussed in the report. I think there's more than ample foundation for him to express an opinion. That's what he's been studying for the last year here.

[II-268] THE COURT: Well, he can go ahead and say what his interpretation is.

BY MR. SLONIM:

Q. Dr. White, in your opinion, did Secretary Graham or Commissioner Lea intend that removal operations would continue as to some other bands?

A. No, I do not believe that to be the case.

Q. And what is the basis for your opinion?

A. Well, the telegram – there are earlier references. Commissioner Lea's report did refer to specific bands. However, as you noted, Graham's authorization did not refer to any specific bands.

The term "Chippewas of Lake Superior" is a term that was used officially to refer to all bands that were paid at La Pointe. I think there are several documents that will show you that this would include the entire group of Chippewa that were being paid at La Pointe, which would include inland Wisconsin bands, would include the St. Croix River, Lac du Flambeau, Wisconsin River, as well as bands along the lakeshore of Lake Superior.

For example, the annuity payroll from January, 1852, which was a payroll for payment to all the Chippewa of

Lake Superior, included all of those inland bands as well as bands located on Lake Superior.

Other than those bands, there was never – there's no [II-269] evidence that anyone intended to continue the removal for any other bands, such as Mille Lacs or any others that had not been included in the removal effort heretofore.

Q. Did Agent Watrous ever use the term "Lake Superior bands"?

A. Yes. He used the term in two letters that I could read from, if you'd like. The point of those – there's a letter from December of 1850. And in his annual report from 1851, he talked of the removal of the Chippewas of Lake Superior and then enumerated some of the bands and clearly mentioned the Wisconsin River as a band included in that general term of "Chippewa of Lake Superior."

Q. Were there any efforts at the time of the suspension under way to remove any bands that are sometimes known as the Mississippi bands?

A. No. There was no mention of any separate kind of activity that would take place that would involve removing anybody else that hadn't been considered for removal up to that point.

Q. I think maybe you've answered the question, but the question I wanted to ask next was whether you found any indication that at the time the removal of the Lake Superior bands, however broadly that was intended, was suspended, that there was at the same time an intent to

initiate removal operations with respect to the Mississippi bands?

[II-270] A. No. They are not mentioned as the subject for removal in any statement of Watrous' at that time, no consideration that, well, we may be stopping one group, but let's resume or let's start up with another group. There's no mention of that.

Q. What was the point of suspending things? What was the purpose of that?

A. Well, it was intended to allow the President – I forget the exact phrasing – but to allow the President to determine what would take place next.

Q. And did you find any evidence that the President ever determined to order a resumption of removal operations?

A. I found no documentation of any resumption of removal. The only aspect of the removal policy that had been in place, and that continued to be in place, was the kind of passive rule that those who did not remove would not be given their annuity'– so basically a choice given to the people who had been ordered to remove, either you remove and receive your annuities, or you stay and survive as you can.

Q. And what did government officials involved in this policy understand that to mean?

A. Well, there's an annual report from, I think Commissioner Lea, where he says, you know, that some groups who had been removed or hadn't removed yet would be remaining – if they did not remove, would

remain in the ceded territory and would have to make their living with hunting, fishing, and [II-271] gathering.

And he said, well, that's a problem, because perhaps the game are being depleted in some areas. But the point of his statement was that, you know, they would survive as they had in the past, hunting, fishing and gathering.

Q. Did this choice of either removing and receiving annuities or remaining and forfeiting annuities, was that applied to all of the bands who had been parties to the 1837 and 1842 treaties?

A. No. It was not ever applied to the Mille Lacs Band.

Q. Were there other bands that it wasn't applied to?

A. Well, Ramsey, I think, was given discretion, was told that he had discretion, in the summer of '52 to exempt other bands. And he did exempt the L'Anse Michigan Band, and they were allowed to stay without losing annuities.

Q. And when you said that the policy wasn't applied to the Mille Lacs Band, were they also allowed to stay and continue to receive their annuities?

A. Yes.

Q. After the Pierce administration took office in 1853, were there additional changes from Ramsey's policy or additional exemptions?

A. Yes. In the summer of 1853, a payment – excuse me, in the fall of 1853 – a payment was made at La Pointe to lakeshore bands of Chippewa.

[II-272] Q. And had those bands removed?

A. No, they had not.

Q. And was the payment made in ceded territory?

A. Yes.

Q. Were any other erosions in Ramsey's policy made in 1853?

A. Yes. A payment was made at the Falls of the St. Croix River to a variety of bands. I haven't seen a list of all the locations where they came from, but that was in December of '53.

Q. And had those bands – were they on unceded lands, or were they remaining on ceded lands?

A. They were on unceded lands.

Q. I'm sorry, were they on ceded or unceded?

A. Excuse me, excuse me. They were on territory ceded in the treaty of 1837.

Q. Who made the payment to the Lake Superior shoreline bands in 1853?

A. That was Agent Gilbert, who I believe was connected with the Michigan superintendency.

Q. And did Agent Gilbert express any views at that time as to whether he believed the removal order remained in effect?

A. Yes. He went out of his way to assure those gathered at La Pointe at that payment in '53 that the government did not intend to pursue a removal policy.

And he suggested, in his correspondence with the Commissioner, that this assurance, in [II-273] order to assure the bands themselves, this assurance should be put in some official form.

Q. And did that happen?

A. Yes. I think that that led directly to the treaty of 1854, which created reservations in the ceded territory. And I think there's one entire provision that is in answer to the concerns that had been expressed by the bands meeting at La Pointe in '53.

And you could also see the treaty of '55, in its placement of a reservation in territory ceded in '37, as also a response, an assurance in official form, that the removal policy was no longer in effect.

Q. Which reservation are you referring to?

A. I'm referring to the Mille Lacs reservation.

Q. Did you find any other evidence that federal officials – did you find any evidence that federal officials believed that the revocation of hunting, fishing, and gathering rights remained in effect at this time, at the time of the '54 and '55 treaties?

A. No. I can find no evidence that anyone even thought about that provision. The fact is that the government was giving out, in annuity goods, materials that would allow people to hunt, fish and gather, things like ammunition and kettles that could be easily transported, which would allow them to continue to pursue hunting, fishing, and gathering.

[II-274] Q. And were those goods given out at the payments you've described in the ceded territory, the St. Croix and La Pointe payments?

A. Yes, I believe so. I would have to look at the exact – not all treaties have a – excuse me, I don't mean treaties – not all annuity payments have a record of exactly what was given out. And so you sometimes have to rely on correspondence. I think in the case of the payment at St. Croix Falls, there is a mention of ammunition and some other things that relate to this.

Q. Did you find any evidence in which federal officials, or anyone else, expressed the view that the hunting, fishing, and gathering rights that had been guaranteed in the 1837 treaty remained in effect at this time, at the time of the '54 and '55 treaties?

A. Well, I think in this case all the correspondence relating to the controversy on the Rum River that I discuss in my report at some length, letters from Hamilton and Gorman and various other documents, suggest that it was widely believed that those rights still existed.

Q. Dr. White, I want to just turn briefly to – I'm going to leave the removal order issue and turn briefly to the matter you discussed at the end of your supplemental report regarding trading opportunities at Mille Lacs in the 1850s.

In your opinion, were trading opportunities increasing or

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White Cross (Excerpts)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

(Caption Omitted In Printing)

* * *

[II-292] Q. You also indicated in your report that there was a suspension or revocation of the Presidential order of 1850. In your searching of the records, did you ever find a document, a governmental document, signed by the President of the United States, or a successor to the President of the United States at the time of the 1850 order, revoking such order?

A. Did I find a statement signed by the President –

Q. Any President of the United States, revoking the Presidential order of 1850.

A. No, I did not.

Q. Now, do you acknowledge that the executive order of 1850 issued by President Zachary Taylor terminated the special privileges of the hunting, fishing, and gathering to the Mille Lacs Ojibwe, as set forth in the 1837 treaty with reference to that ceded territory?

MR. SLONIM: Your Honor, I'm going to object on the grounds that he's given his opinion as to what effect he thought it had. I don't understand his question, unless he's asking for some type of legal conclusion. He testified what effect he thought it had.

THE COURT: Perhaps you could rephrase your question.

MR. PERSIAN: I'll rephrase the question, Your Honor.

[II-293] BY MR. PERSIAN:

Q. Why don't we just look at that order which is before you there, Dr. White.

A. It's no longer before me.

Q. It's the one that was handed to you earlier.

A. What number?

MR. SLONIM: I believe it's 191.

BY MR. PERSIAN:

Q. Plaintiff's Exhibit 191. Thank you, counsel. The plain meaning of that section – let's take a look at the first four lines of that document up to the semicolon. Do you see that?

A. Yes.

Q. Just read that to yourself. There's no need to read it out loud.

(The witness complied.)

Q. The first four lines, now, apply to the 1837 treaty, correct, up to the semicolon? Would you agree with that?

A. Apply to – it's a reference to and a quotation from the treaty of '37.

Q. Have you read the 1837 treaty before, Dr. White?

A. I believe I have.

Q. Have you read the 1842 treaty also?

A. Yes. At some point, I may have read it.

Q. Now, would you agree that starting after the semicolon on the fourth line of that document, if you go down to the third [II-294] line from the bottom where it says "to remove by the President of the United States – do you see that? Omit that part.

Wouldn't a proper reading, proper understanding, of the plain meaning of this is that the hunting, fishing, and gathering referred to in the ceded territory of 1837 is revoked by the President at that time?

A. Yes, there is a revocation.

Q. There's a revocation. There's also a removal portion, isn't that correct?

A. There's a portion of the order which refers to removal.

Q. Those are two separate portions, are they not?

A. Well, they are two clauses, gramatically speaking.

Q. Now, when you're looking at and trying to ascertain historical facts, do you use what's typically called the historical method?

A. The historical method includes lots of things. I don't know what you mean.

Q. Well, would you use the historical method, as defined, where you weigh the information based on the point of view of the people producing the document?

A. That's one aspect of historical research.

Q. You look at various written sources, such as manuscript sources?

A. Yes.

Q. Letters?

* * *

[II-296] Q. Would you have liked to look at those additional records in Boston to sort of fill in those gaps?

A. The gaps in the Historical Society's? –

Q. Yes.

A. Occasionally, the transcript will report that there's a missing portion, and I've sometimes wished that I could be there to look at the original.

Q. Did you extensively review the documents of Sibley and Rice as it pertains to the subject matter?

A. I looked at the Sibley papers and the Rice papers, such as they are, although there are very few Rice documents. Many of them were burned by his widow. Were those the two collections you asked me about?

Q. Yes. You didn't look at all of Sibley's papers, just some of them, I assume?

A. No. It's a very large collection covering many years.

Q. Did you look at President Fillmore's papers?

A. I did look at several rolls of microfilm from the Fillmore papers at the Buffalo County Historical Society.

Q. That's in New York?

A. Yes.

Q. Did you find anything in your searches of President Fillmore's microfilm relative to a revocation of the 1850 order that he had previously signed?

A. Apparently there's no official papers.

* * *

[III-340] Q. Dr. White, would you agree, at least at that point in time, that there still seemed to be some concern about removal with regard to Indians within the area described by that memorial?

A. Concern on the part of territorial legislators – or, excuse me, state legislators, yes.

Q. Dr. White, in the course of your research, did you have occasion to look at congressional authorization and appropriation for continued efforts to remove the Chippewa from the ceded territories in 1837 and 1842 between the focus of your report, I guess, 1849 through '56?

A. I saw mentions of appropriations in the Office of Indian Affairs records. I didn't actually look into the – I don't think I looked at the statutes that relate to appropriations.

Q. Can you just pinpoint approximately when those may have taken place?

A. Well, I believe the first – there was an appropriation in late 1850 or early '51 that may have been the first appropriation. I think I cited one appropriation that was mentioned in the records that Watrous kept that was from February 27, 1850. I'm not sure if that was actually the

first one. No, excuse me – February 27, 1851 is the one I cited.

Q. I think you're right on both counts, probably, Dr. White. I'm making reference to Defendants' Exhibit 24, which is an [III-341] actual copy of the first appropriation that you're referencing.

At the bottom of page 556, Defendants' Exhibit 24, Dr. White, there's a notation "For expenses of removal and subsistance [sic] of the Chippewas of Lake Superior and Mississippi from the lands ceded under the treaty of fourth of October, eighteen hundred and forty-two" – it just refers to the treaty of 1842 – "twenty-five thousand dollars." Is that correct?

A. Yes.

Q. And then I'm going to make reference to Defendants' Exhibit D-25, which is another appropriation act. And I think this is the one in 1851 that you had referenced earlier, is that correct?

A. February 27, 1851, yes.

Q. And at page 572 of that Act, there is again a reference to removal and subsistence of the Chippewas?

A. Yes.

Q. Midway down the page. And that states that, "For expenses of removal and subsistence of the Chippewas of Lake Superior and the Mississippi from the lands ceded under the treaties of the twenty-ninth of July, one thousand eight hundred and thirty-seven, and fourth of October, one thousand eight hundred and forty-two, in addition to appropriation of thirtieth September," which

is the one we just referenced, I [III-342] believe, "eighteen hundred and fifty, twenty-five thousand dollars."

A. Yes.

Q. And then it also provides for expense of removal of the sub-agency of the Chippewa from Lake Superior and the Mississippi from the old site at La Pointe to the new one, including erection of necessary buildings, $3,000. Isn't that correct, Dr. White?

A. Yes.

Q. Dr. White, where was that new agency going to be located?

A. Well, at this point the decision had been made to locate the agency at Sandy Lake.

Q. And did that location actually come to fruition?

A. For a couple of years, the agent was located there.

Q. Would Sandy Lake have been outside the ceded territories of 1837 and 1842?

A. Yes.

Q. Would it have been on unceded lands that the Chippewa had in their possession?

A. Yes.

Q. Dr. White, where did that agency eventually become located at?

A. After Sandy Lake?

Q. After Sandy Lake.

A. Then it was located on the Crow Wing River some miles up

* * *

[III-345] A. Well, it's a very long letter. I can just summarize it briefly, if you'd like.

Q. Please do.

A. I believe in the letter he said that they had learned in Washington that Governor Ramsey was going to decide whether they had to go or stay. That's the basic point of the letter. And so they asked Ramsey to allow them to stay, as he had agreed to previously.

Q. And did Governor Ramsey respond to that letter?

A. Yes, he did.

Q. And what did he tell Chief Buffalo?

A. Again, it's a long letter, maybe not as long as the other one. Just to characterize it – I guess I'd like to look at it again in order to be able to be accurate about it.

Q. Please do, Dr. White. Do you have it in your report?

A. Yes, I cite it in my report. The basic point is that, on page 11-5 in my report – the basic point of Ramsey was, in a sense, a contradiction of the letter he had received from them. He says, "He tells them what they learned in Washington, that it was still the wish and purpose of your Great Father that you should remove from the lands you sold in the treaties of '37 and '42."

Q. And had that been a consistent position that Governor Ramsey had been taking with respect to Chief Buffalo

in particular, telling him that he would be required to remove,

* * *

[III-352] actually had yet to talk to the delegation, stated that he believed they had not accomplished what they set out to do.

Q. And in another correspondence – I'm thinking probably of a letter in late 1852 from Reverend Hall – was there a reference that the delegation had returned from Washington and had accomplished nothing and were a little bit mortified by the result of that?

A. That sounds familiar. I don't know the exact date of that letter. Maybe you have a citation.

Q. I don't have it right at the top of my head, Dr. White.

A. There may be a letter to that effect.

Q. Dr. White, with respect to federal reaction to the removal effort after the issuance of the 1850 order, and then the temporary suspension by telegram of the removal effort in 1851, I believe, August of '51, did you find anything in your research that would indicate that Ramsey and Watrous' superiors in Washington told them that the actions to continue the removal effort would be illegal?

A. No, I found no reference to that.

Q. Dr. White, in your research and your review of the documents for this case, did you find any documentation of Ramsey and Watrous' superiors in Washington telling them to further cease their efforts to continue to remove the Chippewa from the ceded territories?

A. Apart from the suspension order?

[III-353] Q. Apart from the suspension order, Dr. White.

A. Do you mean, was there any correspondence that dealt with that? Well, there was a letter to Treat in Boston that dealt with the same suspension order.

Q. And my question was with respect to Ramsey and Watrous and their superiors in Washington.

A. Did they receive any other letters that related to the suspension? No, not as far as I have been able to find.

Q. So there was nothing, then, Dr. White, beyond having the communication come back that it was Ramsey's decision as to how to continue that effort. Was there anything that you saw from Washington to tell them to stop what they were doing after the telegrams?

A. That's almost a year later that that occurred. So any letter from Washington further stating, further restating, the suspension order?

Q. That's correct, Dr. White. Was there any correspondence or any documentation that you saw?

A. I don't know of any further statement of the suspension order.

Q. You had referenced a moment ago that letter from Hall to Treat that you thought may have some indication on that. Could have that been the November 15th letter of 1853?

A. Well, I was referring to the letter from Lea, Commissioner Lea, to Treat.

• • •

[III-355] Commissioner states that he has just issued a suspension of the removal of the Chippewas until the final determination of the President as to whether they should be permitted to remain or their removal resumed.

Q. And that communicated to one of the missionaries, Mr. Treat, in Boston?

A. Yes.

Q. Did you find further correspondence and discussion of the missionaries – I guess what I'd like to refer you to is that letter that I mentioned earlier, that 11/15/1852 letter from Hall to Treat on the same subject, and that can be found at Exhibit D-27, I believe, that being a letter of November 15, 1852, so approximately a year after the letter you just referenced, is that right?

A. Yes.

Q. Are you familiar with that letter, Dr. White?

A. Yes. I believe I cite it in my report.

Q. Okay. And what does the tenor of that letter convey with respect to Reverend Hall's reflection on whether the removal effort is continuing?

A. Well, he says that he went to St. Paul and hoped to talk to Ramsey about this whole question, but that Ramsey was absent. And so it's unclear on what basis he says this. But then he says that he feels confident that the policy of the government was to use their influence to, I think the [III-356] statement is, "to draw the Ojibwes from the ceded lands." And then he goes on to say that

the only tool to be used was persuasion, withholding their annuities.

Q. And he stated his opinion as to what he thought was going to happen. That next sentence starting with "I am becoming," could you just read that for the Court, please, Dr. White?

A. "I am becoming more confirmed in the opinion that they had better remove and that we had better encourage them to remove as fast as they can be provided for."

Q. And then continue on. There's just a couple short sentences there in that paragraph.

A. "Evils and temptations are rolling in upon them like a flood where they are. But I believe there is hope for them yet, and I do not feel discouraged."

Q. Dr. White, I think this letter kind of restates your testimony earlier yesterday, and perhaps this morning, with regard to the government using a more tacit approach to continual removal effort by refusing annuities being paid where the Indians were located in those former ceded territories, isn't that correct?

A. Yes. I believe I used the word "passive."

Q. Nonetheless, there is continued discussion of actual attempts to carry out that removal policy, isn't that correct, Dr. White?

A. You mean aside from the enforcement of this rule?

[III-357] Q. I mean in line with what you have just described as a tacit attempt.

A. I don't recall anything beyond the fall of '52 that discusses this. But there may be something.

Q. I guess what I was referencing, perhaps, are those petitions from the Wisconsin legislature that would seem to indicate that there was still concern, or maybe even more than concern, that there was almost a competition for where the Indians would reside, whether it be in Wisconsin or in Minnesota, and that that, in fact, would you agree, continued on and was reflected in that territorial resolution of 1854 by the Wisconsin legislature, where they're making the memorial requesting that the Lake Superior Chippewa be allowed to stay where they are?

A. I wouldn't state it in exactly those terms.

Q. But the general tenor is there, isn't it, Dr. White, that the discussion continued as far as whether removal was going to be the policy or not?

A. Among people who were not involved in the Indian Office.

Q. All right. And, in fact, Dr. White, the removal did not fully take place, did not come into being. Through the 1854 treaty, the Indians in Wisconsin were allowed to take reservations there, isn't that correct?

A. You're saying, yeah – well, I think that's the point I made this morning, that the 1854 treaty effectively ended all [III-358] action as a result of the removal order.

Q. And the reason it did that is because it gave them reservations in that Wisconsin area, isn't that correct?

A. Yes.

Q. Given that 1854 treaty, it would not have ended the Mille Lacs Band's concern about removal, if one would assume that they were under the same authority of that Presidential order to remove. Wouldn't that be correct?

A. Well, I don't necessarily make that assumption.

Q. But if one would, the 1854 treaty would not have been enough to remove that concern for removal, would it, Dr. White?

A. Well, that's a hypothetical.

Q. I think it is a hypothetical, yes.

A. Well, it's counterfactual as well.

Q. And the reason that it's counterfactual, Dr. White, is because you don't think that the executive order applied to the Mille Lacs Band?

A. Because they were never told that it applied to them.

Q. Let's turn to that discussion a little bit. Is it your opinion that the Mille Lacs Band did not receive communication that the 1850 executive order would be enforced as against them?

A. Yes, that's my testimony.

Q. Do you have any independent documentation – and I know

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[III-361] A. Yes.

Q. There's specific reference to the St. Croix division of the Chippewa there, so it would probably be reference to the St. Croix Band, and some discussion on what they are subject to. Are you familiar with this particular report, Dr. White?

A. I've looked at it, yes, and cited it.

Q. Would you say that the tenor on page 86 is that the St. Croix bands are at least experiencing extreme problems with conflict between both the lumbermen and the pineries and some of the white settlers that are there? – that first paragraph on page 86 under "The St. Croix division."

A. Well, I guess the reference is to pineries. So it's a reference to lumbermen, involvement with lumber.

Q. And could you just read that sentence starting with "Living altogether among the pineries"?

A. "Living altogether among the pineries, which of late years have been so much resorted to by the whites, their deterioration, through the agency of intoxicating drinks, has been rapid, and almost without parallel. Murders among themselves have become of frequent occurrence; and quarrels arising in drunken brawls have caused feuds between families which have grown so serious that small war parties have been fitted out against one another. During the past few years, a number of whites have also been murdered, and a most aggravating case of homicide occurred the past summer."

[III-362] Q. The next paragraph goes on to discuss what the government action should be in respect to that condition, doesn't it, Dr. White?

A. Yes.

Q. And what is the government action that is recommended there?

A. That they should be removed to Mille Lacs.

Q. And let's read those first two full sentences as to how that's stated in the government report.

A. "This state of things calls for prompt action from government. Living but a short distance from their own lands about Mille Lac, they should, without delay, be removed thither; though, after removal, it would probably require a force to keep them within bounds."

Q. And what does it mean by "within bounds" there, Dr. White, and a specific reference to their own lands in that same sentence about Mille Lacs?

A. Well, I don't know whether "within bounds" actually is a reference to land.

Q. But there is a specific reference, isn't there, Dr. White, to a short distance from their own lands about Mille Lacs?

A. Yes.

Q. And would that, Dr. White, represent the unceded territory to the north of Lake Mille Lacs, including the north [III-363] edge of Lake Mille Lacs?

A. I don't know.

Q. If it says "to their own lands," could one assume that that is one representation that that would be?

A. Yes. I believe there's another letter from Ramsey where he uses that phrase. But he's never precise about boundaries, so it's unclear he doesn't refer to treaties.

Q. Do you remember the approximate date of that letter, Dr. White?

A. Well, I cite it also in my report.

Q. Could we refer to that letter?

A. It's a letter to William Warren in the summer of 1850.

Q. And what is the general context of that letter?

A. Discussions that Warren had had with people from the St. Croix. I'm not sure I can find it here easily.

Q. But the general tenor being that there were problems at the St. Croix and that –

A. And that they ought to be removed to their own lands, whatever that meant. It may not be necessary to find that reference.

Q. There's another reference that I'm thinking of here, too, and it's Exhibit P-217. I believe that's a letter from Watrous to Ramsey.

A. May 25, 1851?

Q. That's right. Are you familiar with that letter, Dr.

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[III-394] not just Ojibwe but also Dakota – that the settlers in various areas of settlement had dealings with Indian

people, and that there were often misunderstandings based on different cultures, different attitudes towards concepts like sharing, the need to share with your neighbors, and that a lot of the incidents had to do with how those cultures interacted, how Dakota culture and white culture, and Ojibwe culture and white culture, interacted.

Q. And what was the interaction you were talking about with the windows-in, windows-out?

A. Well, one of the people, one of the reminiscences – many of these were reminiscences about events that took place at various times in the settlement of Minnesota – one of those people said, you know, white people believe that windows are only for looking out of, but Indians believe that you can look in them, too.

And I think that's kind of a telling contrast between the cultures, that Indian people were traveling through a neighborhood and would look in and see what these strangers, these new people, were doing inside the house. And, of course, the whites had certain rules of etiquette, and you don't wander up to people's windows and look in them. So that's one example of the conflicting etiquette.

Q. And by the settler it might have been perceived as a Peeping Tom or even worse. But that's just a [III-395] misunderstanding?

A. Exactly.

Q. But you don't dispute that the settlers might have been disturbed by these kinds of –

A. No. That's exactly on of the points I make, that reactions differed according to the individuals involved.

Q. Did you give other examples?

A. Of conflicting etiquette?

Q. Um-hmm. I'm looking for similar kinds of things that would distress the settlers by the mere presence of the Indians.

A. Well, there was a belief among Ojibwe and Dakota people that you shared food with strangers. And so when people, some traveler, goes by a house and has a right to enter and ask for food, the people living there have the obligation to help.

And settlers didn't always understand this or believe that sharing should be practiced on such a scale or with strangers, people that they didn't know or had not met before.

Q. And in your report you have examples of – the two that we've just talked about, we can probably agree, are, on the settlers' side, it was a cultural – perhaps an error of perception. They might see something as either threatening or disturbing that they ought not have if they had understood what was going on. Is that correct?

A. That's true.

[III-396] Q. But still they may, or did, report it as disturbing?

A. Some did, yes; not all.

Q. And in your report, pages 4 through 6, 4-7, you refer to some really disturbing anecdotes – 4-6, a man killed; 4-7, two more whites shot, with one wounded. In each of those events, if I understand the thrust of the report,

there was a justification or an understanding, an explanation, for how this transpired between the whites and the Indians, is that correct?

A. Not entirely. The problem with some of these incidents, and the problem with many incidents of these encounters, is that we don't know all the details, and we don't always know the native point of view about what actually happened.

Q. And in retrospect from your historical perspective, it might be unfair that the whites, the settlers, or, through them, the officials blamed the Indians or feared the Indians because of these accounts, isn't that right? It isn't fair, but it did happen?

A. Actually, it depends upon what officials you're talking about. I think Ramsey, for example, in one of his reports, –

Q. I was speaking more generally, but I'll get to Ramsey specifically and the government officials. Let's talk about Ramsey. In 4-5, before he gives his speech to the Minnesota Territorial Legislature, he actually traveled around this area, didn't he?

[III-397] A. Which area?

Q. Well, generally Minnesota, but, more generally, I think within 100 miles of Mille Lacs.

A. I'm not sure exactly. He was along the Mississippi, mostly in the Winnebago agency, and then at the mouth of the St. Croix River.

Q. And he instructed the marshal on one occasion on how to deal with a conflict between Indians and settlers?

A. Winnebago and settlers, Winnebago and – more generally, government officials and Winnebago.

Q. And he talked with the settlers throughout this minitour of the territorial area, didn't he?

A. I don't have any record that he talked to settlers.

Q. The one reference I was going to call your attention to was, there was a dance or something that they had for him on one of his stops?

A. Where the Indians danced for him. He stopped at William Aitkin's house. William Aitkin was a trader along the Mississippi. So in that case it was the trader rather than a settler.

Q. What is that reference? I had written 4-7, Dr. White.

A. No, I don't think it's on 4-7.

Q. Well, we'll move along.

A. It's on 4-1 where he travels to Long Prairie for the Winnebago payment.

[III-398] Q. When he says, quote, "Fisher and other Chippewas here gave me a dance," I took that to be Aitkin having the dance, but –

A. William Aitkin, the trader's, post at Swan River is where he met these Ojibwe.

Q. But generally the point I was getting at, a new territorial governor traveling the area, you would expect he would talk to the settlers, settlers or traders, and find their concerns in the area?

A. Well, he talked to the whites, whoever they were. I don't know, but I have no record of what kinds of conversations he had. I mean, he mentions specific individuals, but how much more he did than he mentions in his diary, I'm not sure.

He was on an information-gathering tour as well as coming to attend to the Winnebago payment and try to solve some of the problems involving the Winnebago.

Q. And so we don't know, of the various settler-Indian conflicts of various kinds that we've talked about, we don't know which of those were expressed to him in the course of this tour. But surely some of those concerns would have been expressed to a new governor?

A. If there were concerns, it's possible they would have been expressed on that trip by somebody.

Q. And then he, Ramsey, returned. And I think at 4-12 you [III-399] talk of the first meeting of the Legislative Assembly. Similarly, don't you think that the delegates to the Territorial Assembly would have had knowledge of the local concerns of the settlers?

A. Again, which settlers are you talking about?

Q. Any in Minnesota.

A. If we're talking about the entire Minnesota territory, these people represented various parts of the territory. They would have known what was happening.

Q. How were they chosen? Did they come from all over Minnesota?

A. Yes. I'm not sure of the number or the size of the districts.

Q. And I presume that there weren't any records?

A. It's not a large number.

Q. But you do presume they had knowledge – some of them, at least, had knowledge of things out on the –

A. Well, they were elected – usually, I think they were residents. They may have been residents in the districts that they represented. For example, William Warren later was a representative from Benton County and the whole area along the Mississippi. I don't think he was in the first Territorial Assembly, however.

Q. And their resolution, which you quote, pages 4-12 to 13, explicitly asked for revocation of the privileges granted by [III-400] the fifth article of the treaty of 1837?

A. Are you quoting from me?

Q. I'm just asking you the questions.

A. Or are you quoting just from the resolution?

Q. I was looking at the resolution and asking your understanding of it.

A. It did contain a request for revocation in the context of all the other things that are mentioned.

Q. Then this was, in turn, sent back to Washington, D. C., of course. And I'm trying to remember if Ramsey accompanied it or preceded it. Do you recall?

A. We'd have to look at the endorsements, and so on, on the letters. Ramsey was in Washington in – let's see, I discuss this –

Q. It's at 4-14, I think. I assume that he got back there about the same time as the resolution did?

A. I think it's possible that, yes, that the resolution was in Washington at that time, although it's not discussed in government correspondence until later on.

Q. And Ramsey made his report – actually, he met with the Secretary and with the President and with the Vice-President, didn't he?

A. Secretaries of War, Navy – yes, he met with the Commissioner of Indians Affairs, Secretaries of War and Navy, and President Taylor and Vice-President Fillmore, according to [III-401] his diary.

Q. And so now we're back in Washington, D. C. for a moment. And, again, I'm pursuing the question of whether the officials making this decision, ultimately issuing the order, had grounds on which they could in good faith have issued an order revoking the hunting and fishing privileges.

We have Ramsey there. He gives an oral report, which probably would have included the concerns of settlers. Can you agree with that in the general proposition without getting to the specific concerns we've talked about? He would have made a report to the Commissioner, at least, and probably to the President and the Vice-President, about what was going on out in the territory of which he was newly governor?

A. Well, he has a written report to the Commissioner of Indian Affairs, –

Q. I understand that.

A. – which says some very specific things. I'm not sure what he would have discussed in those other conversations. There are a lot of things on his mind.

Q. And separately, about this same time, Rice also shows up in Washington, D. C., lobbying for some changes, which you discussed in your report?

A. He writes a letter, I think, from Richmond to Ramsey, if I can find that, in which he discusses – let's see, I think that's on pages 16 and 17 of Section 4. He discusses a

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[III-403] days.

Q. Dr. White, everyone may know this, but we're trying to put in the record here what – and what I was building to was, given this background, if anything, perhaps, would you surmise that Taylor had kind of a predisposition to believe exaggerated accounts and/or to be worried about the worst case scenario, having participated only in the warfare part of this? Does that question make any sense to you?

A. I really – that not something I looked into. I'm not exactly sure what you're asking.

Q. And that's fair enough. Let's set aside these concerns of the settlers and turn to a separate issue just for a second.

You have described several places, I believe 5.5, 5.6 – I'm not going to be asking you about, but I'm giving you the reference in case it's helpful – that at least some of the Indians here thought that the privilege of fishing, hunting, and rice was preserved; they still owned the land.

Or, to put it another way, some of them thought they had only sold the pine trees, is that correct? And I'm not

saying all the Indians. But isn't that what you mention in your report as a perception of some of the Indians?

A. This is a letter by Charles Oakes, and that's essentially – that's one of the points he makes in that letter, yes.

[III-404] Q. Another hypothesis – If a President or responsible Indian Affairs officials knew that some of the Indians mistakenly believed that these privileges of hunting, gathering, and rice – mistakenly believed that meant they still owned the land – a reasonable recommendation to clear the land would be to recommend revocation of that privilege, wouldn't it?

A. I really don't know what would be reasonable. I'm not sure I can make that judgment.

Q. Well, however, they did do so. Do you know who – did you come across any documentation as to who drafted the Presidential order?

A. I don't know. I don't think the material I looked at said who actually wrote it – possibly Brown, but I'm not sure.

Q. With respect to the order, I believe you testified yesterday that you couldn't find evidence that anyone in government expected or intended the 1850 order to affect the Mississippi Chippewas' fishing, hunting, and gathering rights. Is that an accurate – are my notes accurate of the paraphrase, if not a quote, of what you said yesterday?

A. That may be one of the points that are listed at both the beginning and the end of my report, one of the conclusions that I came to as a result of this research.

Q. And you believe that today?

A. Well, I think I said on the first point, I said that the [III-405] removal order of 1850 was never intended to have any effect on the hunting, fishing, and gathering activities of the Ojibwe. I think that's on the abstract page, the first item, No. 1 – abstract page 5, excuse me – and I believe that today.

Q. That's based on a search of the evidence. But can we agree that at least one person in the government left some evidence that it explicitly affected those rights, that at least Zachary Taylor signed the order and knew that it, on its face, affected the hunting, fishing, and gathering privileges of the Mississippi Chippewa?

A. I don't know what he knew when he signed that order. I'm not even sure that he read the order before he signed it. I have no evidence one way or the other.

Q. Would you conclude, then, that the President did not read the order before he signed it?

A. No, I didn't say that. I said I have no evidence one way or the other of what his knowledge was or what his motive or anything else – or understanding, as far as that goes.

Q. Okay. Entirely different issue. The Armstrong account has come up many times and, I'm sure, will again in this litigation. As to that account, you conclude – and I hope this note is better than most of mine – but at page 10-3, quote, "Many key features of Armstrong's account find corroboration in Indian Office records."

I'd like to ask a few questions about that account. And

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

(Caption Omitted In Printing)

* * *

[III-425] THE COURT: Mr. Johnson?

MR. JOHNSON: No, Your Honor.

THE COURT: Mr. Slonim?

MR. SLONIM: No, Your Honor.

THE COURT: You're excused for now.

(Witness excused)

MR. SLONIM: Your Honor, we call Professor John Nichols.

JOHN NICHOLS,

called as a witness by the Plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SLONIM:

Q. Professor Nichols, you're an old hand at this, right?

A. Once.

Q. In a proceeding in Canada?

A. Yes.

Q. Could you tell the Court what your current academic position is?

A. I'm professor of native studies and linguistics at the University of Manitoba in Winnipeg.

Q. And where did you receive your academic training in linguistics?

A. At Harvard University, where I received a master's degree

[III-426 Missing From Original Transcript]

[III-427] Q. What was the subject of your Ph.D. dissertation?

A. It was Ojibwe morphology.

Q. And can you just briefly explain what that means?

A. Morphology is the study of the relationship of the meanings of a language to words and the parts of words, particularly prefixes, roots, and suffixes, and processes of sound change that may have meaning.

This is particularly important in the case of Ojibwe. As is true for many languages of the world, it has extremely complex words that typically consist of several or many, say from 3 to 15, separate meaningful parts, prefixes, suffixes, roots, et cetera, each of which may not necessarily be a word in itself but carry meaning, and the meaning of a whole word depends on the particular pattern or an arrangement of these elements and the meaning of these elements.

Other elements are added that relate words to other words or phrases in the sentence. These are called inflections, and these are also part of morphology.

Q. Could you also describe your approach to studying Ojibwe?

A. Well, the first thing a scholar does is examine all of the possible previous scholarship on the subject. And, for a language like Ojibwe, this includes several hundred years of documentation of the language, primarily by Europeans, but not exclusively, in terms of records of words, records of phrases, dictionaries, word lists, actual grammars constructed as to [III-428] explain how the language fits together, and a fairly large body of examples of transcriptions of actual speech of the language, called text.

That's the first area of my study, were all of the previous and contemporary written records, both published and in manuscript.

And then the other main area is to work with speakers of the living languages by interviewing them extensively about what the words are, what they mean, how they're put together. That is, I determine how they're put together, but I ask questions that give me evidence to work out how the words are put together, how the sentences are put together, how paragraphs and discourses are constructed.

And then I study, I collect by transcription, the examples of the speech, stories, conversations, et cetera, that provide examples of how these things work. And then I try to work out from my interviews and from the actual

extensive examples of the language what the structure of the language is.

Q. How long have you been working with speakers of Ojibwe?

A. Since 1969.

Q. And where have you found speakers of Ojibwe to work with?

A. First, speakers from Leech Lake and Red Lake who were resident in Minneapolis in 1969, and then on the Leech Lake reservation the same year. Following that, I began work at [III-429] Mille Lacs Lake – that was 1968 to 1969 – particularly with Maude Kegg of Mille Lacs Lake, but a number of other elders and middle-aged people of that region.

I have also worked with speakers of Minnesota Ojibwe at Leech Lake, White Earth, Red Lake, Fond du Lac, and Grand Portage. I spent a number of years in Wisconsin, where I worked with speakers from Bad River, Courte Oreilles, and Lac du Flambeau.

And since that time, I have worked extensively with speakers of the language in Quebec, many regions of Ontario, and Manitoba.

Q. Have you continued over this entire period to work with speakers at Mille Lacs?

A. Yes.

Q. Have you compiled word lists of Ojibwe as a result of your studies?

A. Yes. I have, in card-flip file form and on computer, perhaps over 25,000 distinct word stems or words of the language of Minnesota Ojibwe, supplemented by – these were actually obtained from speakers in Minnesota over this period – supplemented by several thousand items from earlier documentary sources that I have not yet checked in Minnesota. And these are paralleled by somewhat smaller bodies of word material from about six or seven other major dialects.

Q. Have you also taught courses regarding the Ojibwe [III-430] languages?

A. I've taught courses in the structure of the Ojibwe language at the University of Wisconsin-Milwaukee, at Lakehead University, at Brandon University, and the University of Manitoba.

And I've taught courses in native language planning and development, which includes issues in how to write the language and issues in modernization, developing new vocabulary, and translation.

And I've taught courses in the history of Ojibwe and other Algonquian languages at the University of Manitoba and Lakehead University.

Q. Have you had occasion to translate text between Ojibwe and English?

A. Yes. That's a major area of the work. Once I obtain linguistic samples, many of them are of interest in other ways, and I work in preparing translations of them along with the actual transcription of the Ojibwe text.

And several of these have been published. Two volumes from Mille Lacs have been published of bilingual

editions, the original Ojibwe text as I've transcribed it and a translation that I have worked out with the help of the storytellers, who are, in most cases but not all, bilingual.

And I'm currently working with a very large body of Ojibwe language texts, many of which do not have any English [III-431] translations, collected in the 1930s and 1940s in Ontario and Michigan, and working on translations for those.

I also work with a very large book body of smaller text of Ojibwe poems, songs, from the 19th through 20th centuries. I've published one small article on one small piece of that, but that's part of a much larger study on problems of translation of Ojibwe literature.

Q. Before your involvement in this case, did you ever have occasion to look at issues surrounding the translation of treaties between the United States government and Indian tribes from English into Ojibwe or Ojibwe to English?

A. I have edited the text of a petition of the Ojibwe of Lake Superior that was presented in 1864 – it was presented in 1865; it was written in 1864 – in Washington. This is, to my knowledge, the only extant bilingual text of a petition.

There may have been others in Ojibwe and English; this is the only one I know of. So I prepared an edition of this manuscript, which is in the Wisconsin Historical Collections in Madison, and published an edition of that text.

And that brought out the question of, although I have not written extensively in the edition about the problems involved in what went on in this bilingual text in translation, we do have a parallel text of Ojibwe and English about, essentially, a series of grievances being stated by the Ojibwe about various treaties from 1825 forward. So the topics mentioned [III-432] most relate directly to treaty negotiations and settlements.

Q. Is one of the treaties discussed in that petition the 1837 Chippewa treaty?

A. Yeah, I believe it is.

Q. Have you also had occasion or opportunities to observe the work of interpreters who are attempting to interpret from Ojibwe to English and English to Ojibwe, not doing written translations, but doing live interpretation?

A. Yes. On a number of occasions, I've make a point to observe court proceedings in Ontario and Manitoba in areas where people are brought before the court who are monolingual Ojibwes or Ojibwe-dominant and require interpretation services. And I have made a point of studying the procedures involved here, and I've also given a workshop to interpreters involved in court interpretation in Ontario.

Q. Professor Nichols, I've handed you a copy of Exhibit P-296. Could you identify that for me?

A. Yes. It's the official Linguistic Department Handbook extract that has my most current vitae, up to the date it was submitted in early 1994.

Q. And is that an accurate summary of your publications and other materials?

A. It's a list of publications relating to work I've done.

Q. Professor Nichols, did you prepare a report entitled "The Translation of Key Phrases in the Treaties of 1837 and 1855," [III-433] which has been marked as P-300?

A. Yes.

Q. And does that report set forth your professional opinions regarding matters of translation of the 1837 and 1855 treaties?

A. Yes.

Q. And do you adopt your report as your direct testimony in this proceeding?

A. Yes.

Q. I'd like to ask just a couple questions about how you went about doing the work that led to the writing of this report. Could you tell the Court how you began the project? A. Well, I was asked to – well, I was asked to examine some questions that were sent that related to the treaties of 1837 and 1855, particular passages of those treaties, mostly connected about the question of how they might have been translated and what the understanding would have been in Ojibwe of those passages.

So my first task was to examine the text of the treaties, the English text of the treaties, particularly those passages in question; to, from my own knowledge of

Ojibwe, try to work out what some of the possible strategies that might have been used by an interpreter would have been, what kinds of meaning areas are being covered in English, what semantic areas, what kinds of words and phrases and grammatical constructions would [III-434] have been required – a fair range of possibilities – for those particular passages.

Q. What did you do next?

A. Then I – realizing that these are 19th century documents, I turned to the available documentation for mid- to early 19th century Ojibwe.

Primary sources are a very large dictionary of the south shore of Lake Superior Ojibwe by Bishop Frederic Baraga – I believe the date is 1853 – and accompanying grammar of around the 1850s, which is also very extensive; a variety of published and unpublished lists and grammatical discussions; word lists by Henry Schoolcraft, who was a U. S. Indian agent at Sault Ste. Marie, and, of course, a traveler in Minnesota and a scholar of Ojibwe; a sampling of other word lists, both published and unpublished, by travelers and scholars, including some extensive material done by a U. S. military doctor, Edwin James, in conjunction with a speaker of the language named John Tanner, and some translations that they had done; and some other translations from English done around the period, to try to see what, if any, of the semantic areas that seemed to turn up in the treaties or the particular words in English were represented in any of these materials, what kind of words might have been in Ojibwe at the time.

Q. Did you look at any more recent written materials?

A. Yes. Some of the material was already in my data files, [III-435] a large collection of Ojibwe language text from the Minnesota-Ontario border area, written down around 1905 or so. And much of that material was already in my files.

And I looked at the modern dictionaries, scholarly dictionaries, the primary ones being the Ojibwe, Chippewa, Ottawa dictionary of Richard Rhodes, 1985, and then my own lexical files, the unpublished files I've referred to.

Q. Did you do anything else in addition to reviewing documentary sources?

A. Well, then I went to talk to, interview, some speakers of Ojibwe, elders particularly, who I thought might be knowledgeable about some of these meaningful areas, semantic areas, and vocabulary and grammatical constructions that could be used to translate these things, and to see what their strategies would be for translating significant portions of the passages in question.

Q. Was this something – was this unusual? Is this something you did just for this project?

A. No. This is the normal procedure I'd use if I were writing a paper in this area or trying to examine how something in English might come out in Ojibwe, or to explore the meanings, the semantic areas, in Ojibwe.

If I were to try to study an area or the vocabulary or the grammar in Ojibwe of something like the notion of travel, I would do the background research and look at

the documentary [III-436] sources, and then go to speakers and work with them by crafting questions or allowing opportunities for their volunteering information that seemed relevant to what I was asking about, take that information in and evaluate it in terms of my linguistic methodology and my experience with the language and the background preparation in that particular area.

Q. How old were the speakers that you met with in connection with this project?

A. Well, there were two speakers in their 90s, I think two speakers in their 60s or 70s, and I associated with one of the other speakers in his 50s.

Q. And where were they?

A. In Minnesota at Mille Lacs, at Cass Lake and on Leech Lake Reservation, and in Wisconsin. And I talked to some people in Ontario as well. Some of those were younger people than the ages of the people I mentioned.

Q. What did you do to account for possible changes in the language from the time these treaties were negotiated until today?

A. Well, I had made a fairly thorough study of this over a number of years, partly by working over completely the dictionary of Frederic Baraga, which dates in the 1850s – actually probably dates from work in the 1830s and '40s; it was published in the 1850s.

[III-437] And I checked almost all of these items with speakers at Mille Lacs and elsewhere in Minnesota over a long period of time. So I was aware that the word stock had varied remarkably little, that the meanings of the

words and the forms of the words were remarkably stable. There were very few differences.

And, from working with the grammar, I knew that the grammar worked essentially the same way and that there were very few differences between the record of the language made by people like Bishop Baraga and by Henry Schoolcraft and the language spoken by the oldest people at Mille Lacs in the 1960s, '70s and '80s, and today.

I also had occasion to deal with this issue in previous testimony I gave in Ontario where one of the issues involved the comparison of material from Mille Lacs, collected by me in the 1960s and '70s, with material collected by Henry Schoolcraft in the area ranging from Sault Ste. Marie westward in the 1830s. And my conclusion then, and documented in that report, was that the language was essentially the same and represented exactly the same dialect, and there were very few differences.

Q. Let's turn now to a summary of the conclusions you've reached, which are presented in your report. First, can you summarize the conclusions you reached about the general ease or difficulty of translation between English and Ojibwe at the [III-438] time the treaties were made?

A. I believe it was a very difficult process, for a number of reasons. One, that interpretation under a negotiation situation is difficult in the best of times. It's one that's governed by immediate pressure – someone speaking, someone else wants to speak. The meaning has to be gotten across very quickly. There's no chance for correction usually or a long thought involved.

Today we require a great deal of training for professionals in this area, such as in the United Nations or in the Canadian government. So in the best of circumstances, interpretation, even between very closely related languages that have many similarities in their structure and vocabulary, is difficult.

It's particularly acute when we have languages like Ojibwe and English that are almost as different as any two languages can be in terms of their structure and their meaning pattern and their linguistic structure; that there's very little direct parallelism between the vocabularies of the languages, between the way words and parts of words and sentences are constructed or put together, and between the meanings underneath them.

And this, I think, makes interpretation a very difficult process. It did then, and it still does today, that the languages are just very radically different.

[III-439] Q. Are there terms for the same things in each language?

A. Sometimes concrete objects that are tangible often have parallel terms, but even in those cases the words may not overlap. One may have a generic term and several specific terms underneath it; the other language may only have specific terms or a generic term.

The range covered by even a name for a tangible object might cover several related objects in one language, and there might be specific terms in another. Even things that I think most speakers, to take an example, would think of in English as being obvious, that should be universal, that everyone would have a word for

"brother," that what is defined as a brother is something universal in human life, and there should be a word for "brother," and you assume that there's going to be a word for "brother" in some other language.

There's no word for "brother" in Ojibwe. There are four or five or six words for "brother" in Ojibwe, none of which parallel exactly the meaning range of the word for "brother" in English, and each one of which extends beyond what "brother" would be used for in English. Each one specifies a certain type of relationship and may have other meanings as well.

So there's one word that refers to an older brother, but not a younger brother, that can be used by a male or a female. There's another word that refers to a younger brother or a [III-440] younger sister – it's the same word – that can be used by a male or a female, but it doesn't mean anybody older than you.

There's another word that can be used by a female to refer to a brother of either age, but not by a male. There's a word that can be used by a male to refer to a brother, but not to a sister. And it can't be used by a female.

And then many of these words – actually, there are several of those words – each of these words might also refer to what in English is called a cousin, at least certain kinds of cousins. So all of these words overlap certain meanings of the word "cousin" in English, and none of them correlate exactly with the word "brother" in English.

And that's even more true for abstract ideas and relational ideas and more complicated things that aren't objects or beings.

Q. Would there be particular problems in translating words or concepts that pertain to American legal concepts into Ojibwe?

A. This is a particular problem, because English has a highly developed legal vocabulary. It's been working on it for hundreds and hundreds of years. It is something that is cultivated and refined by a very large body of people. It is something that's taught in schools, in law schools, by books, and refined constantly by institutions like courts.

So very fine shades of meaning are distinguished in the [III-441] English legal system. And much discussion, I understand, goes on in courts about the meanings, the particular meanings, of words used in courts.

And these refer to a specific legal system. Ojibwe also, apparently, traditionally had a legal system, as does any culture, and had vocabulary appropriate to that legal system. But it's a totally different legal system, and the vocabulary just does not interact, relate, at all to the meaning distinctions made in the English legal system, as I understand it, or to the vocabulary for it.

Particularly this is true in relation to notions of private property or personal property or individual ownership of things, and particularly of land, a matter of great concern, I understand, in the English American legal system, but not one of concern much in the traditional Ojibwe legal system.

So this particular area – it isn't just that there aren't words for the things that there are many words for of very fine shades of meanings in the English legal system, but the very concepts, the very structure of a legal system underneath that is concerned with these things, and the ideas underneath, are simply not there in the Ojibwe culture. They're something very, very different.

Q. What conclusions did you reach about the likely quality of the interpretation at the treaty negotiations that you [III-442] studied for this case?

Q. Well, on these general principles of my work with the differences in the language, that the radical differences in both the vocabulary and the idea structure underneath the vocabulary, and in the grammatical systems of the language, these radical and extreme differences, the basis of the differences in the cultural and legal systems underneath the specialized vocabularies for each language that would relate to the issues, political and legal issues discussed at these events, and from my observations of the problems encountered today by bilinguals who serve as interpreters in the Canadian court system going between English-Ojibwe and Ojibwe-English, and also from my work with translators of English legal and governmental documents in Canada into Ojibwe, I believe that there were many problems in translation, that there were frequent misunderstandings at these events in the interpretation process, both ways, in the languages.

Q. I want to turn specifically to your conclusions about the passages in the treaty that you studied, beginning with Article V of the 1837 treaty. What did you conclude was the most likely translation of the phrase

"the privilege of hunting, fishing, and gathering of the wild rice on the lands, the rivers, and the lakes"?

How would that have been translated into Ojibwe? And give us what it would have meant to the Ojibwe.

[III-443] A. Well, we would have something sort of – I'm trying to back-translate, in a sense, to give you some idea of some other English equivalents for how it might have come out, most probably came out, based on my understanding – that it would have come out something like "The Indians," the Anishinabe, the Ojibwe – "can or will obtain their means of survival from" – and I'm not sure whether lands, rivers, and lakes all would have been mentioned; it would be very unlikely – I would just think it would be "from the land," and that there would have been no direct translation of "privilege."

The notion of "privilege of hunting, fishing, and gathering" in English involves this idea of a noun naming an abstract kind of thing, privilege, some kind of ability to do or not do something, some kind of advantage someone has. Whether that's granted by someone else or that's inherent or claimed is ambiguous in English.

It's a noun that would have a relationship in English to certain other nouns, hunting, fishing, and gathering. Ojibwe doesn't work by naming activities with nouns. It uses verbs to name processes activities and states. And nouns typically only name the actual physical things, or the beings involved in sentences.

So it's very awkward to have a group of nouns naming these kinds of activities. I find no noun that translates "privilege" or anything of that notion.

[III-444] Every time that the word "privilege" occurs in the treaty petition I mentioned from 1864, which is a contemporary example of translation of government language into Ojibwe, or vice versa, that wherever there's "privilege" in the English text, there's no representation of it by a separate word in the Ojibwe text. But there is simply a tense prefix on the verb, a prefix that gives the indication that this will take place, could take place, can take place, might take place, or ought to take place.

Q. Professor Nichols, when you said that – initially, I think you said the likely translation would be that the Ojibwe can or will take or find their means of survival from the land. Would that have implied any limitation on the kinds of resources they could use?

A. No. The most likely translation here involves a verb stem – I'll not cite it unless asked; it's in the report – that essentially means "from a long, live, be in the state of." And this is the most common complex verb used by Ojibwes at the time, and today, when discussing living off the land – hunting, fishing, gathering, exploiting any of the resources of the land, including minerals, for whatever purpose, including for trade as well as for one's immediate consumption or use, for the manufacture of articles from plant or mineral product, et cetera.

It's all the means of survival obtained from the land are [III-445] covered by this. To simply list hunting, fishing, and gathering wild rice is somewhat of a strange selection, given, particularly in the minutes of the discussion of the treaty of 1837, this phrase is translated repeatedly into English. From my examination of the English,

I've determined that that must have been the word underlying it.

And a number of other activities are mentioned specifically, such as maple sugar-making, et cetera. And the selection of simply gathering wild rice as the only gathering activity seems unusual. Given the frequency of this term or verb for making one's living from the land at the time, and today, I think that's the term that would have been used to translate.

Q. How about the phrase "guaranteed during the pleasure of the President of the United States"? What is your conclusion as to how that would have been translated? And maybe you can just start by telling me what the conclusion is.

A. Well, the conclusion is that it would have been translated most likely by some kind of phrase that would say, "It is guaranteed. It is firmly fixed by law, by council," these things that have been mentioned, firmly fixed in council.

And then we run into difficulty with the phrase "during the pleasure of the President." I believe that it would have been translated by a phrase that would have meant something [III-446] like "as the President is happy" or "because the President is happy" or "at this time, during this time, the President is happy."

Q. Is there Ojibwe equivalent for the phrase "during the pleasure of"? It doesn't have to be the President, but just "during the pleasure of."

A. No, not that I could determine. There's no direct equivalent, and any attempt to translate this notion of

during someone's pleasure results in a number of inconsistencies that simply don't work out in Ojibwe.

It's possible to make up a noun for "pleasure," but, again, this is a state or a process that is normally referred to by a verb, so it wouldn't have been named as if someone owns or possesses some thing called "pleasure."

The notion of "during" can't go with a noun. It's simply impossible. In Ojibwe, these nouns cannot be conceived of as having duration boundaries. So there's a real conflict between using something like "during" along with something like "pleasure."

This seems to me what Boutwell must have been getting at when he said, "The Ojibwe know no duration to a man's pleasure" – I don't quote that exactly – and this is exactly what I find, I found before I heard that quotation, in trying to analyze the possibilities of translating this phrase.

If you do re-interpret "pleasure" as its normal verb [III-447] form, which would be probably to be happy, or to be pleased – and there are a couple of possibilities that could be used there – then you can use a word like "during," a very common adverbial or syntactic word meaning "during," that could go with the verb "during the time the President is happy."

But this also has a very different meaning in Ojibwe from the word in English. It doesn't seem to have any limit on the time. It simply refers to simultaneous with some other action – "during this time, this also happens."

It doesn't imply that there's any kind of limit at either end to it, that it's only during this time, and after

that it will not be true. So there's sort of an aspectual – a technical term in linguistics – difference for this between Ojibwe and English, although there's a very common equivalent for translating "during."

So the meaning, the most common words or expressions that, I think, would translate that "during someone's pleasure," turn out to mean something very different in Ojibwe.

Q. And in the field work you did for this case, did the speakers that you worked with have difficulty translating this phrase?

A. I got all sorts of different strategies for this. And when I tossed some of them back, then people would say, well, that's confusing; it sounds like he's happy while he's doing [III-448] that. And this, of course, is consonant with the understanding at the time that the President, the Great Father, is a benevolent figure and that he does things out of goodness, as a leader would do.

So it doesn't seem any conflict in at least probably in the 19th century, that the President would be happy. And this would go along with something being guaranteed.

Q. Let's turn to the 1855 treaty, and in particular the terms "right, title and interest" that are used in Article I of that treaty. Were there, or are there, any Ojibwe equivalents for those terms?

A. I don't believe there were any equivalents for these terms, and there still aren't accepted equivalents for any of these terms.

There have been some proposed equivalents for one of these terms in a recent legal dictionary prepared in

Ontario – that was done in 1992 – but up to that time, I've found no record in my word lists at all, or any of the older or modern dictionaries, that gave any kind of equivalent for any of these as nouns with anything like these meanings of "right, title or interest."

Q. What did you conclude was the most likely translation of Article I of the 1855 treaty?

A. I'm sorry, could you read me the sentences involved again?

[III-449] Q. I'm talking about the sentence about the Ojibwe – well, let me turn to your report; it's in your report.

A. Yes.

Q. "And the said Indians do further fully and entirely relinquish and convey to the United States any and all right, title and interest of whatsoever nature the same may be, which they may now have in and to any other lands in the Territory of Minnesota or elsewhere." What did you conclude was the most likely translation of that sentence?

A. Well, to reflect it back into English, it would come out something like "The Indians offer, yield over, give over, relinquish the land." And then it could have some clauses that would limit which land is being talked, the land which has been ceded – is that the term?

Q. Any and all.

A. Any and all. There are various modifiers that could have been added in to distinguish which land is being talked about. And there's also another verb that

could have been added to the notion of "relinquish," relinquish and convey.

The word for "convey" is a very good image. It's one of sliding, physically sliding, something over to someone. And that occurs both in older dictionaries and is suggested by one of the contemporary speakers, were that to be interpreted.

In many cases where English legal texts or government texts – I'm speaking here both of the treaty petition of 1864 [III-450] and the contemporary documents in Canada – have this double-barreled or triple-barreled set of nouns or verbs to sort of add formal weight to things or to add specific meanings, interpreters and translators often simply translate one of them, because there's often no distinction in meaning between the direct equivalents for these in English. So many things are left off, particularly English bureaucratic and governmental and legal prose, when being translated into Ojibwe.

Q. Do you think that the translation with respect to conveying the lands, would the words used have been similar to what was used in the 1837 treaty, to translate Article I of that treaty, in which certain lands were ceded?

A. Yes. The main verb here, the first one I mention, which is essential here to translate "relinquish," is exactly the same word that I believe is used repeatedly in the – well, not repeatedly – but was used in the 1837 treaty to mean "cede." And this is the word almost always translated, in Baraga's dictionary and in other documents, as "cede."

It occurs in the treaty petition of 1864 translated as "cede." But it also occurs translated, both in the dictionaries and in the other documents and today, with the meanings, in English, to present to someone, to lay it down, to place it down, to offer to someone – very common translation – and to sell to someone.

[III-451] When it involves land, it often has to be translated as "sell" in English, but its basic meaning seems to be one of "to offer." And to give up something to someone involves this verb or one of the related verbs that are composed of the same basic word elements.

Q. One last question, Professor Nichols. Would the translation of Article I, the sentence I read to you from Article I of the 1855 treaty, and the way you understand it would have been translated, would that have suggested that the Ojibwe were, in some sense, changing or relinquishing what they had under Article V of the 1837 treaty, the ability to make their living off the land?

A. No. It just seems to require a translation that says "we offer the land" or "we relinquish the land itself" in exactly the same sense as in the treaty of 1837, where the same, what I believe must be the same, word being used is "cede."

MR. SLONIM: No further questions, Your Honor.

THE COURT: Okay. I think this is Mr. Froehle?

CROSS-EXAMINATION

BY MR. FROEHLE:

Q. Mr. Nichols, as part of your training, were you involved in helping to put together publications which taught Ojibwe to people whose native tongue was English?

A. Part of my training?

* * *

Nichols Cross (Excerpts)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

(Caption Omitted In Printing)

* * *

[III-458] were able to understand one another, could they not?

A. Particular period or particular groups?

Q. Let's talk about in the 19th century, in the mid-1800s. If the Mille Lacs Band wanted to communicate with Lake Superior bands, did they speak the same dialect?

A. They most probably spoke the same dialect, as I believe that Bishop Baraga's work represents the dialect spoken on the south shore of Lake Superior.

Q. Okay. Now, Indian bands had occasion, through trading, did they not, to communicate to bands who spoke either much more different dialects of Ojibwe or different Indian languages, didn't they?

A. I don't know that trading is the occasion for that. I'm not a historian.

Q. You're aware, however, of a concept called trade languages, are you not?

A. Oh, yes.

Q. Okay. And was a trade language an attempt to find a medium or a tool for communication between two people who didn't have a common language?

A. Was and is in many parts of the world.

Q. The Ojibwe utilized trade languages, didn't they?

A. Yes. I believe the Ojibwe are among the tribes of the Mississippi River Valley, the Wisconsin River Valley, possibly the Missouri River Valley, and the Red River Valley that used [III-459] a trade language.

Q. And that would include the Mille Lacs Band of Ojibwe?

A. I have no evidence that they did.

Q. Do you have any evidence that they did not?

A. No.

Q. Now, when you spoke to some speakers for your report that you prepared for this case, am I correct that you spoke to seven speakers?

A. Oh, I'm not sure of the exact number. I interviewed formally three people in particular and then had less formal discussions with two in the U. S. and two or three people in Canada.

Q. Okay. There are a wide variety of skills as a speaker of the language, are there not?

A. Yes.

Q. There was a variety amongst the seven speakers you spoke to even, wasn't there, in their abilities to speak Ojibwe?

A. Well, the people I talked to were people that were recognized as being particularly fluent. There was

perhaps more variation in their abilities to speak English than there was in their abilities to speak Ojibwe.

But certainly they all had different knowledge, perhaps, of specialized areas of Ojibwe vocabulary, as do any two or three speakers of English who come from different families or different places.

[III-460] Q. You don't consider yourself fluent in Ojibwe, do you?

A. No.

Q. And, in fact, of the speakers you spoke to, wasn't just one, Mr. Clark, the only one you considered a fluent speaker of Ojibwe?

A. No. He was perhaps, of the Americans that I interviewed, the most fluent speaker of English.

Q. The most fluent speaker of English, you're saying?

A. Yes. Or the most fluently bilingual in both languages.

Q. I believe you referred to the 1864 petition that you reviewed, which was Plaintiffs' Exhibit 258. Is that the petition you had authored or edited?

A. I didn't know it was an exhibit. Yes.

MR. FROEHLE: Your Honor, counsel and I discussed yesterday, while the Court's not addressing evidentiary matters right now, we have the complete document, part of which was Plaintiffs' Exhibit 258, and I'm going to be asking the witness about it. I have copies for the Court, if I could approach.

THE COURT: Well, it just has struck 4:30. So we'll do it in the morning at 9:15.

(Adjournment taken)

* * *

[IV-500] i-n-a-b-i, "to be situated or live in a certain way or place"? Isn't it translated that way there?

A. Yes. There are other translations possible, but that translation is given in this glossary here, the parallel text.

Q. All right. Now, the words we've looked at in your glossary and the dictionary so far, would it be correct to say that you don't know one way or another whether those words were available for use during the 1837 or 1855 treaty negotiations?

A. I don't have any actual words from those treaty negotiations. I'm quite certain that at least some, if not all, were available for use at that time by those speakers. I don't see any reason why they weren't.

They're attested early, they're structurally quite stable, and they're used in modern Ojibwe, or potential words in modern Ojibwe. But I have no actual attestation of any Ojibwe words actually used at those proceedings.

Q. Do you remember at our deposition you informed me of the word "boo shke gian," and you translated that as meaning "it's up to you"?

A. Well, as I said then, I don't quite understand the use of that or the cultural dimension of that word or those words.

Q. Do you remember, though, you also told me there was a way to say, or translate the meaning of, "he will choose"?

A. Oh, yes.

[IV-501] Q. And a way to translate the meaning of "let him choose"?

A. Yes.

Q. And the way to translate the meaning of "you can choose it"?

A. Yes.

Q. Would there be a way to translate the meaning of "Leave it to yourself, Father"? Or would that be something that would not have a cultural meaning to the Ojibwe?

A. I don't know what it means in English. I'd have to ask you what "leave it to" means in this context. How would you use this phrase? There's a number of possibilities as to what "leave" could be in English, "to leave it to yourself."

Q. So it would be difficult to translate without a further contextual basis, is that right?

A. Well, I'm a little confused as to what "leave it to yourself" means.

Q. So in the sense of the English language, you're not sure what the intended meaning is, which makes it difficult to translate into Ojibwe, is that correct?

A. Yeah. If I were pressured, as an interpreter's pressured, I'd probably just go ahead and pop something in. But I don't know what it means.

Q. Now, the Ojibwe language has always had a wide variety of grammatical devices and connections that explain abstract relationships such as "at that time," isn't that correct?

[IV-502] A. I don't know if "at that time" is an abstract relationship. Are you talking about temporal things only?

Q. Let me withdraw the question and ask it in another way. Didn't the Ojibwe language have, you believe at that time and has today, a way to convey what we in English describe as "at that time"?

A. Yes.

Q. On page 161 of the Baraga dictionary – I'll let you turn to that; the pages are not in chronological order – I think it's about midway through the packet.

A. I have one in the Ojibwe English section.

Q. This is where the word "iwapi" is found.

A. (Pronouncing) "Iwapi," yes.

Q. I-w-a-p-i?

A. I'm not sure if it's one word or two.

Q. Now, it says "adv." there. Does that mean it's an adverb?

A. Well, that means he classified it that way, or the editor did. But the grammatical classificatory words are

not necessarily the ones we'd use today. It's hard to use English grammatical terminology to label Ojibwe words. I think it's fair to call it an adverb.

Q. Is it translated there – I'll go through first what's after the first spelling, i-w-a-p-i – as being "then" or "at that time"?

[IV-503] A. Yes.

Q. And then there's two different versions of it, aren't there, i-w-i-d-i or i-w-e-d-i, is that correct? Do you see those?

A. No, I don't. I just see "i-w-a-p-i, adv. Then, at that time." Then there's another word, "iwidi" or "iwedi, adv. There; thence; yonder," which is actually two distinct words, I believe.

Q. Okay. Now, is the word "when" sometimes translated as "megwa," m-e-g-w-a?

A. One of the words "when" is translatable as "megwa."

Q. And there are a variety of ways to connote the meaning of "when," right?

A. Well, there isn't a single meaning of "when" in English. Again, we'd have to have a context to know which meaning of "when" we're using. You can't just take any usage of "when" in English and translate it by any word given in the dictionary, a bilingual dictionary, that happens to use that meaning. You'd need a much more precise modern dictionary to make those distinctions.

Q. And it would depend on the entire context of the meaning that's trying to be conveyed, is that right, and the way it's used?

A. Is this an interrogative "when," as an interrogative word in a question, or is it a relative word "when"? Is it used [IV-504] with a clause following? Is it used as an adverb in relation to a verb in a main clause? I'd have to know all those things before one could determine equivalency.

Q. There's a way to translate the notion of "when" in the sense of a time of an event, though, isn't there?

A. There are several.

Q. Several ways, okay. The word "until," is that translated at least one way as "binish," b-i-n-i-s-h?

A. In one set of usage, yes.

Q. That could also be translated as "up to," couldn't it?

A. Yes. I don't quite understand the full equivalency here. I mean, "up to", again, is used in a great number of ways in English action, at least some uses of that. So there's one translation that may be used for "binish" in certain context.

Q. Did the Ojibwe have ways of conveying the idea of an individual having power or authority over someone else? Are you familiar with such a word or set of words?

A. I think there's probably a number of them that would refer to different types of power or authority, depending on the nature of the authority, a familial one, a

governmental one of certain types, and so on. I'm not sure I know the full range of possible ways of expressing that. I'm sure I don't.

Q. If you look at page 198 of Baraga, which is about three-quarters of the way through the packet, do you see in the first column, about a quarter of the way down, they define [IV-505] the word "power" in a variety of ways, is that correct?

A. As an English noun at the start of the entry, yes.

Q. Now, aren't they also defining it in the sense of what it says here, "I have power" or they have the word "authority" in parentheses, "over him, her or it"? They have different ways of translating those various concepts, do they not?

A. Well, there's a variety of them given here translating that English, yes.

Q. In other words, there's an Ojibwe way of explaining each one of those meanings, is that right?

A. Baraga gives some translations of the English, but clearly that there's at least two quite different concepts involved here, two totally different sets of words translating the single one in English. And both of them are – they're very odd. These are the kinds of words primarily used in translating from English.

These are extreme derived forms, that they just have affix after affix added on. I suspect that there are much simpler, more basic ways of expressing something like it. But they're very odd.

Q. And do you believe that these ways, and perhaps the other simpler ways you've talked about, would have been available for use by the Ojibwe in the 1830s and 1850s?

A. Yes. Again, the concept of what type of power is involved and what type of authority is involved, how physical [IV-506] it is, and what sphere or realm of society is involved would be factors.

Q. They would have the way to describe power in the sense of authority, say, of the leader of the band to decide when to move to the next seasonal camp?

A. Well, I think you'd have to ask an anthropologist, perhaps, about whether that was the power of the leader.

Q. If we assume it was, linguistically, could that concept be conveyed?

A. I'm sure there'd be a way to do it. Sometimes the words that –

Q. Thank you, Dr. Nichols. If we look at the glossary again briefly on this statement, on page 98, I believe, towards the top in the left-hand column, the third word down, have you found that page yet, sir?

A. Gashkitoon?

Q. Yes. Is that g-a-s-h-k-i-t-o-o-n?

A. Yes.

Q. And is that translated here as "be able to" with "do s.t." following?

A. Yes.

Q. And, again, depending upon context, this might be a word that would be able to express this idea of being able to do something, is that correct?

A. Yes. There are many other translations required [IV-507] sometimes, depending on how this word is used in an Ojibwe sentence. But that's one of its core meanings.

Q. Now, if we go down that same page a little bit, page 98, there's a word there, g-a-a w-i-i-k-a-a. How is that pronounced?

A. That's probably two words, (pronouncing) "gaa wiikaa."

Q. And that's translated as "never"?

A. Yes.

Q. And what does the PC before that indicate?

A. That it's a grammatical particle, that it's an uninflected word, not a noun or verb.

Q. I assume this is just one of many ways that the idea or concept of "never" would be able to be translated, depending upon various contexts?

A. Yes. It could also be "gaawiin weekaw," and perhaps several others.

Q. Do you recall at the deposition you explained to me that the word "awi," a-w-i, could be translated as "voluntary use" or "permission"? And I think we were looking at the context of a band member borrowing an item from another band member.

A. A-w-i apostrophe.

Q. Thank you for the correction. Is that a correct statement?

A. Yes.

Q. If we look at page 192 of the Baraga materials, which is [IV-508] apparently close to the end, about three-quarters of the way towards the back, if you look in the top right-hand column – this is in the English-to-Ojibwe section – the word "perpetual" is described as "kagige," k-a-g-i-g-e, is that correct?

A. (Pronouncing) Kagige.

Q. Thank you. And is that a correct usage of "perpetual" in some contexts?

A. I only know this word from written texts and prayers, that it's a very formal word, and I'm not sure it's used at Mille Lacs today. The usual translation is in a Christian religious sense of eternally, forever.

Q. So there were other terms that explain "forever" as a concept, is that correct? – if this one wasn't used at Mille Lacs, and you're not sure if it was. Am I right on that?

A. Yeah. I'm not sure about this one. There's a number of words that refer to great extents of time, or projecting forward.

Q. Looking on this same page on the left-hand column at the bottom, there's the word "permit." And am I correct, there are a variety of uses and translations set forth there?

A. Yes.

Q. Where it says "I permit," and it has the word "allow" in parentheses, can you read the Ojibwe translation for me, please?

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[IV-526] is a way I was trying to express that the oral documents I have recorded and those I've looked at seem to distinguish between occupancy lands and other lands that are available for resource use that are not occupied by someone else."

Do you recall making that statement at your deposition, sir?

A. Well, it's here.

Q. Now, when you translated the word "guarantee" in the 1837 treaty, I believe you referred to it as somehow fixed in law. Is that generally correct?

A. Yes, with an implication by council, I think.

Q. And by "council," what do you mean?

A. That the part of the word that was most probably used to translate "guarantee" that refers to law is complex, and it turns up in a variety of word stems. And it seems to have its primary meaning, if it's not a literal one, to decide in council, or to rule in council, or to set in council.

Q. And that's not the literal meaning of the word but how it's connoted, is that correct?

A. Well, it's not a word. It's a formative element in making word stems. And it consists of two or three other

pieces, one of which has to do with organic solid, especially linear. And another one has to do with "to handle by use of hand" or by "in an abstract way." So it seems to mean to me like "to set firm."

[IV-527] Q. Now, if the intent was to translate the meaning of "guarantee," meaning set in place or reserved, modified with the idea of during the pleasure of the President, as including some discretion, would a different word than what you chose to translate "guarantee" be available?

A. I don't understand the structure of the question, sorry.

Q. I'll ask it in a different way. As I understand, in your report on page 8, you said if there was a restrictive phrase following the word you chose to translate "guarantee," that this would have contradicted the strength of the probable translation, because the word you chose, "guarantee," it would be unlikely to be qualified, is that right?

A. Yes. The word that was suggested and that I've offered as the most probable translation for "guarantee" is an extremely strong one. And, as in English, guarantees don't normally go with qualifications, I guess.

Q. Now, if the translator wanted to qualify "guarantee" and knew that "guarantee" had limitations, from the English perspective, wouldn't that translator have been able to pick a different word, such as "reserved," and then had the qualifier "promised for a time" or "until the President says"? What other words would have been available to the translator?

A. Well, probably hundreds. "Reserved" in its normal Ojibwe translation probably wouldn't be appropriate, as it, in my knowledge, was reserved pretty much for physical objects or [IV-528] beings, but always many possible translations, depending on the understanding of the interpreter of the source and of the time and abilities of the interpreter.

Q. So if the interpreter knew that what the message he was trying to send was not absolute, but had some condition or qualifier attached to it, that interpreter had many other options he could have chose to translate "guarantee" than the one you have chosen, isn't that right?

A. The one I've offered as the most probable translation.

Q. As the most probable literal translation, is that correct?

A. Yes.

Q. And as the most probable direct equivalent, is that correct?

A. Yes.

Q. A direct equivalent, am I correct in my general understanding of that, is when we try and find words that match up without having to have suffixes and prefixes, is that right?

A. No. I think it would be a word that matches up closely with the meaning in the source language without required too many meanings to be left off or too many things to be added in the translation. Sometimes that's possible, especially as two languages are closely related, that there may be fairly parallel vocabularies. And it's possible, maybe easily, to

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[IV-539] language, and then he moved on to Ojibwe. And he attempted to provide some spread for his missionaries.

Sometimes the word is marked; more often it's not as distinct. So, in using such a dictionary, one has to know whether this word, in fact, is Ojibwe or Ottawa. Not all the words in there are, in fact, Ojibwe, and he mentions that, I think, in the title.

Q. I want to go back to a minute ago. I don't think I actually – I want to clarify. When I asked you what you had said after you first read the executive order of 1850, was what I said to you an accurate statement of your testimony that day?

A. I'd have to examine –

MR. SLONIM: Your Honor, if Mr. Froehle wants to know whether there's something in the deposition, it seems to me he should identify a passage in the deposition and have the witness read it.

MR. FROEHLE: I'll do that.

THE COURT: The page and the line.

BY MR. FROEHLE:

Q. Pace 153 of the deposition, please. This was reviewing the order of Zachary Taylor. Beginning on line 15, would you read through line 23, please?

A. "Then you have 'is revoked,' 'they are hearby revoked,' so there is the full clause, and then – and so that's a full [IV-540] clause. Then, semicolon, and 'all of the said Indians,' that's a separate clause. That's conjoined to the other ones. So essentially two clauses. These two things are revoked. 'And the Indians remaining on the lands are required to remove.' That's the linguistic structure of that. That I get. I would have to work it all out. It is quite dense. There is only essentially one sentence, and it's hard to process" –

MR. FROEHLE: The witness was reading far beyond the requested passage, Your Honor.

MR. SLONIM: Well, Your Honor –

MR. FROEHLE: If he wants to do that, that's fine. I'll let him read further.

THE WITNESS: I'm sorry, I didn't –

THE COURT: Just one moment. The rules provide, of course, that if there's something that's related that should be considered, it should come in at the same time. Not being familiar with the deposition as counsel are, I take it there's a – is there another paragraph there or the completion of the paragraph?

THE WITNESS: I just was trying to complete the paragraph. I guess I didn't understand –

THE COURT: Yes. Go ahead.

THE WITNESS: "And it's hard to process this in English without, almost without a pencil in hand to work it

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[V-555] I've used, looking at all the early records of the language, examining my own records, working with speakers of the same continuing dialect, to look at some of these words which you've used which haven't come up before –

Q. Does this mean you don't know as you sit here today, sir?

THE COURT: Just one moment. Don't interrupt when the witness is answering.

A. Claim is a difficult concept that would have to be evaluated. I don't think there would be – it would be very difficult to express, even using phrases, anything that would get across within Ojibwe anything resembling the equivalent of a legal notion of claim in English, as I sort of understand it, being it's just not a legal concept, I believe, in traditional Ojibwe law, and the same with some of the other words you've used.

BY MR. FROEHLE:

Q. Would there be sufficient words and word tools available to the Ojibwe in the Ojibwe language in 1837 and 1855 to convey the meaning that you can hunt, fish, and gather until the President, or the Great Father, says to the contrary or withdraws permission?

A. Probably the meaning "withdraws permission" has some difficulties involved. I don't think there would be any way to say President or Great Father alternatively.

I believe only one expression would have been used, [V-556] probably the Great Grandfather or Your Great Grandfather. And I don't find a direct word in any indications that there would have been a word for "President" other than that.

Q. Would there have been words and word combinations and language tools available to the Ojibwe in 1837 and 1855 to convey the meaning of "you can hunt, fish, and gather wild rice in the country until the President asks you to move"?

A. "Country" meaning? –

Q. The area or the –

A. Not the United States?

Q. Referring to generally the 1837 ceded territory.

A. Referring generally?

Q. Yes.

A. That clause wouldn't have been part of what you want translated or indicated – just "the country"?

Q. "The country" or "the area."

A. Yeah, I think there would have been words and grammatical structures and morphology available in Ojibwe at that time to express something that would be generally equivalent to that with none of the shades, particularly of verbs, and the notion of all of the relational things would be just a little off, or least.

Q. Would there have been words, word combinations, language elements available to the Ojibwe in 1837 and 1855 to convey the meaning of the message that they are allowed to hunt, [V-557] fish, and gather wild rice in the area as long as the President allows?

A. Allows what?

Q. As long as the President allows or as long as the President permits.

A. Who's "they"? I'd have to know who "they" was.

Q. Referring to the Indian bands that the message would be conveyed to. Would you like me to re-ask the question?

A. Well, they would have to put it in the first person, since you asked if they would have the language available. They'd have to say, "We can." They'd have to make a number of grammatical changes in order to express that.

Q. With those grammatical changes made, could the message be conveyed in the Ojibwe language?

A. Roughly, yes.

Q. Would there be a way to convey in the Ojibwe language that would have been available to the Ojibwe in 1837 or 1855 that they, meaning the Indian bands, no longer had any right of control over these lands any more?

A. That would would [sic] be very difficult. "Right of control" – very difficult to get that across.

Q. How about if we took the word right –

A. It's a very abstract relationship.

Q. Did you want to finish?

A. I'm done.

[V-558] Q. How about if we took the words "right of" out of there and said that they no longer had any control over these lands?

A. That would be difficult with the notion of control as a thing. As they don't own an abstract process and relationship, that would be difficult.

Q. There would be a way to express, however, in 1855 Ojibwe, that the band would no longer control the use of an area?

A. Well, again, we're asking for use as a thing, as if it's a thing. But it's an activity which would require a whole different conception in the language.

So you can't deal with use as a thing very easily or very well in Ojibwe. It would have been difficult to try to express this notion of this abstraction as an object.

Q. Would it have been more understandable to the Ojibwe if it was translated in some sort of a verb form?

A. Yes.

Q. Such as earning or making a living from the land?

A. Well, "earning" and "making," again, are nouns. If it were translated that way, we'd have, again, to go another couple of "removes" from the English.

Q. With grammatical corrections, could the message be conveyed, however?

A. Roughly, the message can be conveyed. Again, none of the meaning boundaries overlap exactly with what would be available in Ojibwe or the meaning pattern underlying the [V-559] formal structure of Ojibwe.

Q. Turning to your report now, Dr. Nichols, am I correct that your report is one way that certain language in the 1837 treaty may have been translated?

A. The certain items that I dealt with specifically, that I believe that's the most probable way that these would have been dealt with at that situation by the interpreters at that place at that time.

Q. There were other possibilities available, however, at that time, meaning 1837, weren't there, though?

A. Many other possibilities.

Q. So your report, at least to some extent, is dependent upon your first opinion, which is that the interpreters did not have a wide array of grammatical devices and language ability, isn't that correct?

A. No. I don't believe that is a first opinion anywhere.

Q. Let's turn to page 5 of your report for a moment, looking at the third full paragraph that starts "While some of." Do you see that?

A. Yes.

Q. If we go down four lines, do you see where it refers to "a pigeon Ojibwe was widely used in the Mississippi"?

A. Yes.

Q. Then if we go down to the bottom of that paragraph about five lines up, where it says, "The pigeon recorded by James [V-560] and documented by him as being of wide use meets these criteria," do you see that?

A. Yes.

Q. Don't you believe that when the government is selecting interpreters for treaty negotiations that they would have selected individuals who had some ability more than the ability that was in wide use?

A. I'm sorry, I just don't understand the question. That would have ability other than that's in wide use – I'm saying that this particular language, I believe, was in wide use in the Mississippi Valley at this time. Also Ojibwe was in wide use. I just don't understand what –

I also have evidence, from reading of travel explorations by government parties, that even the government parties had great difficulty with the official interpreters that they hired during the process and that they often had to settle for absolutely incompetent people. We have the testimony of Schoolcraft, summing up his entire career as of the 1830s with the government interpreters, that the government interpreters were often incompetent.

I'm not certain that the government at that time, apparently from the records, was able to distinguish what competence in interpretation was or was able to find people to meet the requirements.

Q. Looking at that same paragraph from your report, do you [V-561] see where it says, "While some of the interpreters were probably fluently bilingual in both Ojibwe and English" up on the top of that paragraph?

A. Yes.

Q. Isn't it true, then, that some of those interpreters had a better command of parts of the Ojibwe language than even you?

A. Yes.

Q. Looking at the fourth line from the top of page 5 of your report, do you see where it refers to "Flat Mouth had made a remark which the reporter did not understand," referring to part of the journal?

A. Yes.

Q. That does not say, does it, the part quoted here, that the interpreter did not understand it, does it?

A. Well, I'm not sure if the reporter meant the interpreter who reported the remarks to the group, or if it meant the interpretation given by the interpreter was inadequate for whoever the reporter, perhaps the writer of the document, to understand.

Q. Turning to page 8 of your report, Dr. Nichols, if we look at the top, about the fourth line down over towards the right, where it says, "Speaking of the lands," one of the individuals at the treaty negotiation says, "We have heretofore got our living from them." Do you see that?

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[V-563] an interpretation situation.

Q. You also refer to, on page 4 just a few lines up from that spot, the part from the '37 journal from Antwerp, where there's apparently a notation of "unfit to act in that capacity." Do you see that?

A. Yes.

Q. You have no firsthand knowledge, do you, sir, as to why that reference was put in the journal?

A. No.

Q. You don't know whether Van Antwerp was upset that the interpreters were taking a long time to interpret?

A. Oh, that might have been one of the factors in evaluating performance. One would expect that has to do with clarity of meaning being carried across, as far as he would understand it, but it might refer to the total job performance, yes, or other aspects of it.

Q. In fact, wouldn't it even be possible that Van Antwerp was upset that after the various sessions that the Indian bands would come back to him seeking clarifications, because they may have spoken to missionaries or other individuals during the interval time, and that that embarrassed Van Antwerp? That could have been another possibility, couldn't it?

A. Yes, that's another possibility, that he felt that the Indians were understanding too much of what was going on,

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[V-579] duration of a man's pleasure would allow them to stay in a territory?

A. Well, when I heard this in court, and it was mentioned to me after the completion of my report, or after the major writing of the report, that there was something like this in Boutwell's journal, my interpretation was, and still is, that this is a linguistic comment parallel to my previous discussion or understanding of the phrase from the treaty –

Q. During the pleasure of the President?

A. – "during the pleasure of the President" – and that I felt this was a linguistic comment about the exact same structural point that I made about the phrase lying behind this, that it was a comment about the difficulty of talking about duration of a noun of pleasure, particularly in Ojibwe.

Q. And hasn't it been your testimony this morning and earlier yesterday, Dr. Nichols, that, in fact, that there were ways to convey and there were words to get the concept of "pleasure" across between English and Ojibwe?

A. A pleasure, yes, but they wouldn't be the same concept of pleasure. It would be a somewhat different concept.

Q. But the concepts were there, and the ability to place a limit on the amount of time was also something that could have been translated between English and Ojibwe, isn't that correct, Dr. Nichols?

A. No. I have testified that "pleasure" just doesn't go [V-580] with the notion of having "limit." You can't have duration on a noun in Ojibwe, especially with this notion of "while," which wouldn't go with a noun in Ojibwe like "pleasure." And it wouldn't indicate cutting off or the beginning, only the simultaneity of pleasure with the other clause.

Q. Are you saying that the Ojibwe had no way of expressing within their language the concept of something of a limited duration?

A. Some thing of a limited duration?

Q. Some time of a limited duration?

A. Certainly, some time of a limited duration, yes.

Q. Would it be true, Dr. Nichols, that they would be able to say, "We are going to be able to have this pleasure for a week or a month or a year"?

A. Yeah. We'd perhaps have some duration on the having, but they wouldn't say "have the pleasure." It would nominalize something that's just not treated as a noun normally in Ojibwe. It would be very unusual to say "have the pleasure." The duration would be on the having. But it just seems a very unlikely kind of phrase in Ojibwe.

Q. Let's switch to a concept – and, again, the use of concepts to surmount the obstacle of not being able to do literal translations, if we assume that there were at least a few interpreters that were at those negotiation sessions that understood that you can't do literal translations and get the [V-581] meaning across – if we assume that, isn't it correct that there's a possibility that they could be told

that they would be able to be on those lands while allowed to be there by the President of the United States?

A. It's a possibility that something like that could have been expressed, yes.

Q. Thank you, Dr. Nichols. Let's switch to the concept of privilege here and see exactly what the problem with privilege was that you were conveying in your testimony yesterday. Is it that there just wasn't a concept for privilege in Ojibwe?

A. Well, it seems like a very sort of language specific kind of abstraction, and I don't find equivalents for it in any of the sources I have, nor could I think of one. And all the speakers I worked with, I believe, had difficulty with expressing this notion.

The 19th century documents, the treaty petition that does it, it translates it with a tense or modal prefix, which has very different senses. But the notion of privilege, meaning an ability or an advantage that someone has, presumably over others, that can be something that is granted or something that is inherent or inherited.

It can come about by a variety of means. It can be preexisting or something that can come to be on the basis of something. This is a paraphrase from dictionary definitions that I have consulted, but I can't quote them exactly.

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[V-609] in particular as disclosed in your resume, but also today, your expertise is in translation. You've never been an interpreter?

A. I've never been an interpreter. I have observed Ojibwe interpreters working in situations, especially in court, and I have worked on training those in a workshop. But I have not interpreted myself. I've never worked as an interpreter.

Q. To be honest with the Court, Dr. Nichols, if we were hiring someone to interpret the treaties today, would you be capable of the interpretation process as you understand took place at the time of the treaties, or would you be more comfortable waiting and translating it for us later? Could you interpret these treaties?

A. Oh, no. No, I wouldn't dare attempt getting involved so deeply in such issues as diplomatic language.

Q. Well, let's talk for a moment, then, about the people that were doing the interpretation. Did you understand that those brought by the Indians were native Ojibwe speakers?

A. No. I have no knowledge of exactly who they were.

Q. Were any of the people whom you spoke to, the seven that you spoke to, did they grow up in an exclusively Ojibwe background? Or was it a first language to all of them? – the seven informants whom I understood you used to confirm your analysis.

A. I believe it is Maude Kegg, I think, grew up in somewhat

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